

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

— *United States Court of Appeals*
For the
No. 15,642 *District of Columbia Circuit*
— **FILED** JUN - 9 1960

JOHN J. WHITE, JR., *Appellant* *Eugene L. Stewart*

v.

CLERK

WILLIAM A. BROWN, *Appellee*.

12

— **Appeal From a Judgment of the United States District Court
for the District of Columbia**

—
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STATEMENT OF QUESTIONS PRESENTED

The questions presented are:

First, in a trial to enforce payment of a partnership obligation against a former member of the firm who upon his withdrawal was indemnified against liability for partnership debts by the continuing partners who assumed responsibility for payment of the same debts, should the Court direct a verdict in favor of the obligee without allowing the jury to consider the issue of whether under the circumstances the former partner was not in fact a surety for the payment by the continuing partners as principals of the partnership debts and was not released from liability by the conduct of the obligee who, with notice of the change in status of the partners, extended the remaining partners' time for payment by the acceptance of promissory notes without notice to the retiring member of the partnership; and

Second, whether the trial court should direct a verdict in favor of the obligee without allowing the jury to consider the issue of whether the obligee's knowledge of the former member's withdrawal from the partnership and the assumption by the remaining partners of the partnership's obligations coupled with the obligee's conduct in looking solely to the continuing partners for payment of the partnership debt and his subsequent acceptance of promissory notes from the remaining members of the partnership to evidence the obligation arising under the contract did not constitute a waiver of the obligee's rights against the former member of the partnership.

INDEX

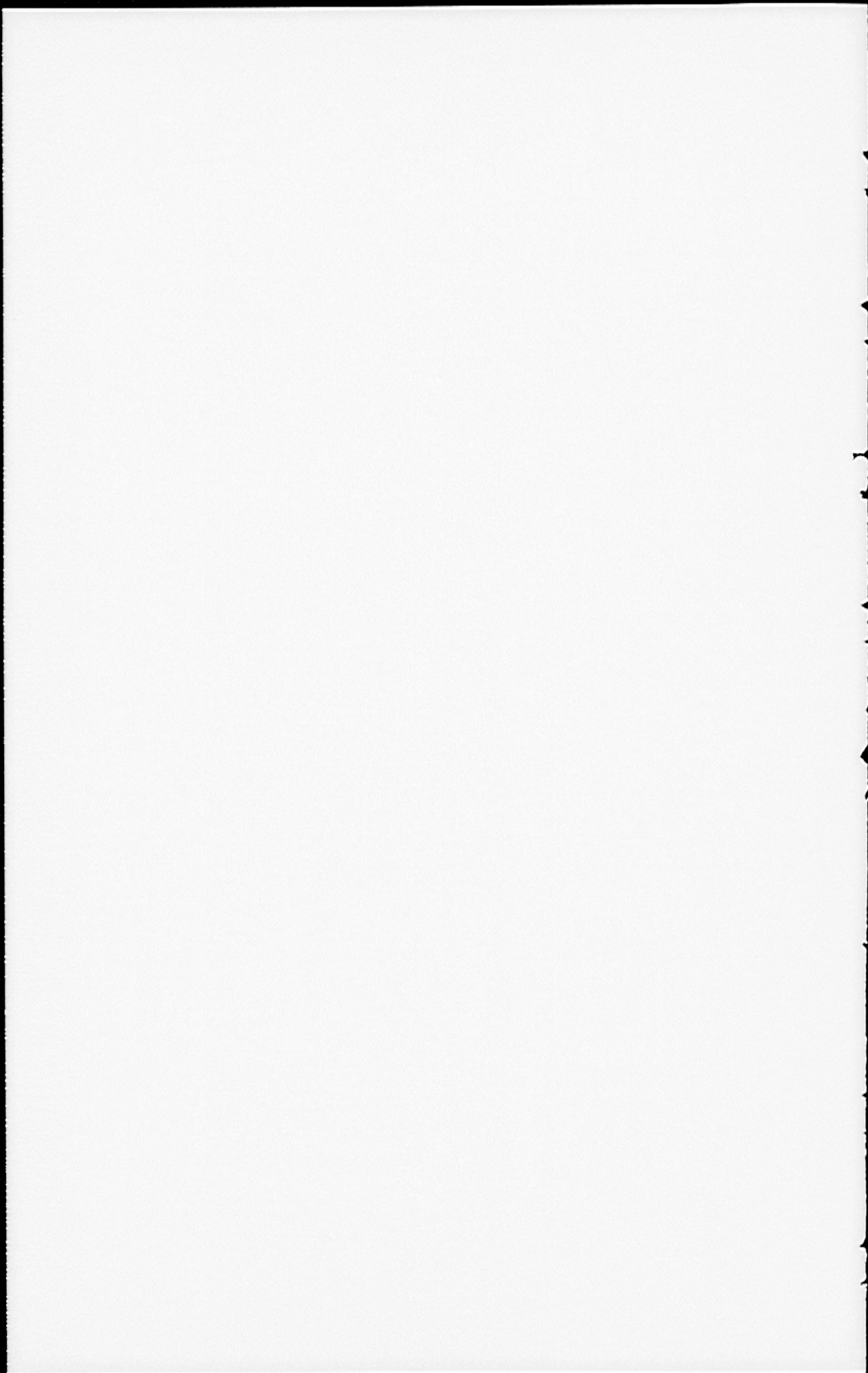
	Page
STATEMENT OF QUESTIONS PRESENTED	i
JURISDICTIONAL STATEMENT	1
STATEMENT OF CASE	2
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	4
ARGUMENT	5
1. The jury could have found that under the circumstances of the case the defendant White was a surety for the payment by Noakes and Neubauer of the former partnership's debts	5
2. The jury could have found that plaintiff extended the time of Noakes and Neubauer for payment of the partnership debt by his acceptance of promissory notes with due dates extending serially for more than a year beyond the due date, thereby releasing defendant White from responsibility for payment of the debt	8
3. The jury could have found that in view of the withdrawal of defendant White from the partnership with Noakes and Neubauer, and the assumption by the latter of the liabilities of the old firm, the plaintiff's conduct in the light of his knowledge of these arrangements in looking exclusively to Noakes and Neubauer for payment as manifested by the manner in which the principal debt was invoiced, and by his acceptance of promissory notes from Noakes and Neubauer without reference to defendant White, constituted a waiver of his rights to hold defendant White liable, or alternatively an acceptance of the liability of Noakes and Neubauer in place of the liability of the old firm	15
CONCLUSION	17

TABLE OF CASES	Page
Albertson v. Bray Wood Heel Co., Inc., 113 Vt. 184, 32 A. 2d 125	17
Chambers v. Tobin, 92 App. D.C. 274, 204 F. 2d 732 ..	18
Clark v. Gerstley, 26 App. D.C. 205, <i>aff'd</i> , 204 U.S. 504	10
Colgrove v. Tallman, 67 N.Y. 95, 23 Am. Rep. 90	6, 9
Dunbar v. Farnum, 109 Vt. 313, 196 Atl. 237, 114 A.L.R. 996	16
Eastman v. Pelletier, 114 Vt. 419, 47 A. 2d 298	16
Faricy v. J. S. Brown Mercantile Co., 87 Colo. 427, 288 P. 639	9
Furr v. Herzmark, 92 App. D.C. 350, 206 F. 2d 468 ..	18
Gillet v. Ivory, 173 Mich. 444, 139 N.W. 53	16
Hauge v. Bye, 51 N.D. 848, 201 N.W. 159, 36 A.L.R. 613	11
Heiden v. Beuttler, 11 F. Supp. (D.C., N.D. Iowa)	10
Heller v. Mattar, 135 F. Supp. 767 (D.C., W.D. Ark.) ..	9-10
Leithauser v. Baumeister, 47 Minn. 151, 49 N.W. 660 ..	6, 9
Loketch v. Capital Transit Co., 101 App. D.C. 289, 248 F. 2d 611	17
Ludington v. Bell, 77 N.Y. 138, 33 Am. Rep. 601	6, 9
Mears v. Farmers Cooperative Fire Ins. Co., 112 Vt. 519, 28 A. 2d 699	17
Millerd v. Thorn, 56 N.Y. 402	6, 9, 14
Peigh v. Baltimore & Ohio R.R., 92 App. D.C. 198, 204 F. 2d 391	17, 18
People ex rel. Little v. Grant, 138 Mich. 60, 100 N.W. 1006	6, 9, 12
Preston v. Garrard, 120 Ga. 689, 48 S.E. 118	6, 9, 11
Regester v. Dodge, 6 Fed. 6, 9 (C.C., E.D.N.Y.)	15, 16
Scott v. Scruggs, 60 Fed. 721, 725 (5th Cir.)	6, 9
Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529	6, 9
Sorenson v. United States, 226 F. 2d 460 (9th Cir.) ...	10
Stapler v. Anderson, 177 Ga. 434, 170 S.E. 498	6, 9
Union Life Insurance Co. v. Hanford, 143 U.S. 187, 191	6, 9
United States v. America Bonding & Trust Co., 89 Fed. 921 (C.C., D. Md.)	12
United States v. Ross, 176 F. Supp. 932 (D.C., D. Neb.)	10

Index Continued.

iii

	Page
Vary v. Norton, 6 Fed. 808 (C.C., W.D. Mich.)	6, 9
Zastrow v. Knight, 56 S.D. 554, 229 N.W. 925, 72 A.L.R.	
379	11
Restatement of the Law, Security, § 129(1), Comment a	10
Crane on Partnership, § 79	6
Stearns, Law of Suretyship (Elder's Revision, 5th ed.),	
§ 6.22	10
40 Am. Jur. 279, Partnership, § 215	6, 9
50 Am. Jur. 944, Suretyship, § 58; 950, § 63	10
50 Am. Jur. 952, Suretyship, § 66	10
56 Am. Jur. 126, Waiver, § 24	16
Anno., 9 LRA (NS) 88, 90, 92	11
Anno., 35 LRA (NS) 57	10



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,642

JOHN J. WHITE, JR., *Appellant*,

v.

WILLIAM A. BROWN, *Appellee*.

**Appeal From a Judgment of the United States District Court
for the District of Columbia**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On January 19, 1960, the United States District Court for the District of Columbia entered a judgment pursuant to a verdict directed by the Court on the motion of the plaintiff, William A. Brown (JA 8). This Honorable Court has jurisdiction to review this judgment pursuant to Title 28, United States Code, § 1291.

STATEMENT OF CASE

Plaintiff, a consulting engineer (JA 11), contracted in writing on September 17, 1956, with a firm of architects, White, Noakes and Neubauer, to prepare plans and specifications for the mechanical and electrical work for a hospital in Costa Rica for a fee of \$22,015 (JA 12, 13). The architectural firm was a partnership, and the defendant, John J. White, Jr., was a member of it when the contract was entered into (JA 24). Defendant White withdrew from the partnership on January 2, 1957 (JA 24, 30), the remaining partners, Noakes and Neubauer, assuming responsibility for partnership obligations and indemnifying White from liability for the same (JA 26, 27). The plaintiff's contract was completed in February 1957 (JA 13).

Plaintiff performed other work for the firm of White, Noakes and Neubauer for fees and charges of \$5,000 (JA 11, 12) and \$4,599.53 (JA 13, 14). Plaintiff received payment of \$4,969.43 of the \$5,000 fee (JA 12), and services of an agreed value of \$4,453.55 (JA 14) prior to the commencement of this action for balance due of \$21,661. (Complaint, JA 1). Subsequent to suit miscellaneous credits totaling \$1,002.18 accrued to White, Noakes and Neubauer (JA 15, 16), leaving plaintiff's claim against that firm at \$20,659.27 excluding interest at the time of trial (JA 16).

Plaintiff received notice of defendant White's withdrawal from the firm of White, Noakes and Neubauer sometime in April 1957 (JA 19, 23). Plaintiff also had a conference with the defendant White in the latter's office (JA 25) at which time defendant White informed plaintiff of the terms of a dissolution agreement by which he withdrew from the partnership with Noakes and Neubauer (JA 26, 27), including the fact that Noakes and Neubauer were to be responsible for all obligations and the defendant White was being held free and clear by them of liabilities of the old partnership (JA 26, 27).

Subsequently, bills sent by plaintiff's office dated June 6, August 3, and October 1, 1957, for fees due on the hospital job in Costa Rica were made out to "Noakes & Neubauer" (Defendant's Exhibits 1, 2, and 3, JA 42, 43); while statements sent regarding the \$5,000 fee due on a separate job, dated June 1, August 3, and October 2, 1957, were made out to "White, Noakes and Neubauer" (Defendant's Exhibits 4, 5, and 6, JA 43, 44). The latter was paid except for a balance of \$30.57 (Defendant's Exhibit 6, JA 44). Plaintiff did not see these statements personally. They were sent out on the basis of his books (JA 21).

At the suggestion of Neubauer (JA 20, 33), on September 28, 1957, plaintiff accepted (JA 20) twelve promissory notes, eleven in the amount of \$2,000 each, and one for \$1,400, signed by Noakes and Neubauer. By their terms the notes became due monthly commencing November 1, 1957, and extending through October 1, 1958. The notes were given by Noakes and Neubauer after plaintiff had called them on the telephone requesting payment (JA 33). (Defendant's Exhibits 7 through 18, inclusive, JA 45-48). The notes were prepared by plaintiff (JA 33). Defendant was not consulted about the execution of the notes (JA 27). Plaintiff did not ask defendant White to sign the notes because he "didn't care who paid the obligation of White, Noakes and Neubauer. Noakes and Neubauer promised payments. White had started new business and didn't seem financially able to pay at that time." (JA 21).

Not until a meeting of the creditors of Noakes and Neubauer some seven months later, in April 1958, did plaintiff indicate that he would hold defendant White responsible (JA 23, 27).

STATEMENT OF POINTS

1. The trial court erred in granting plaintiff's motion for a directed verdict, in that there were genuine issues of material fact raised during the course of the trial relating to:

a. the creation of a principal-surety relationship between appellant and his former partners, appellee's knowledge of the facts giving rise to such relationship, and appellee's conduct in the light thereof; and

b. appellee's conduct as constituting a waiver of his rights against appellant.

SUMMARY OF ARGUMENT

1. The jury could have found that Noakes and Neubauer assumed personal liability as principals for the obligation of the partnership of White, Noakes and Neubauer to plaintiff and entered into an agreement to hold defendant White harmless from such obligations; further, that plaintiff had knowledge of this arrangement and that he was therefore obliged to treat defendant White as surety for the payment of the obligation by Noakes and Neubauer as principals, respecting all of the customary rights of the surety with respect to changes in the nature and terms of payment of the obligation.

2. The jury could have found that after the plaintiff was informed of the arrangement whereby Noakes and Neubauer became primarily liable for the debt owed to the plaintiff, and defendant White was indemnified by them against such liability, the plaintiff treated Noakes and Neubauer as principals and by accepting from them promissory notes payable monthly over the course of a year, extended the time for payment of the debt without notice to or consent of the defendant White, thereby releasing the defendant White from further liability.

3. The jury could have found that plaintiff looked solely to Noakes and Neubauer for payment of the old partnership debt as shown by his conduct in billing only them, in telephoning them demanding payment, in accepting promissory notes from them for the amount of the debt, and by not asking defendant White to sign the notes; and that plaintiff thereby voluntarily relinquished his rights to hold the defendant White liable for the debt. Under the doctrine of waiver, such findings would prevent the imposition of liability on the defendant White.

ARGUMENT

1. **The Jury Could Have Found That Under the Circumstances of the Case the Defendant White Was a Surety for the Payment by Noakes and Neubauer of the former partnership's debts.**

From the testimony in evidence the jury could have found that

(a) The defendant White withdrew from the partnership with Noakes and Neubauer (JA 24, 30);

(b) The remaining partners, Noakes and Neubauer, agreed to be responsible for the then existing obligations of the firm, including that to plaintiff (JA 26, 27);

(c) The remaining partners, Noakes and Neubauer, agreed to indemnify the defendant White against liability for such obligations (JA 27);

(d) The plaintiff received notice of defendant White's withdrawal from the firm (JA 19, 20, 23); that Noakes and Neubauer had assumed responsibility for payment of the amount due him (JA 26, 27); and that they had agreed to hold White harmless from such liabilities (JA 27).

Where a partner withdraws from the partnership and the continuing partners assume the burden of partnership liabilities, the relation of principal debtor and surety is

created. *Preston v. Garrard*, 120 Ga. 689, 48 S.E. 118; *Stapler v. Anderson*, 177 Ga. 434, 170 S.E. 498; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529; *People ex rel. Little v. Grant*, 138 Mich. 60, 100 N.W. 1006; *Union Life Insurance Co. v. Hanford*, 143 U.S. 187, 191; *Vary v. Norton*, 6 Fed. 808 (C.C., W.D. Mich.); *Scott v. Scruggs*, 60 Fed. 721, 725 (5th Cir.); *Leithauser v. Baumeister*, 47 Minn. 151, 49 N.W. 660; *Millerd v. Thorn*, 56 N.Y. 402; *Colgrove v. Tallman*, 67 N.Y. 95, 23 Am. Rep. 90; *Ludington v. Bell*, 77 N.Y. 138, 33 Am. Rep. 601; Crane on Partnership, Sec. 79, pp. 348-351; 40 Am. Jur. 279, Partnership Sec. 215.

By the majority rule, creditors who have notice of a partner's retirement from a firm and the assumption by the continuing partners of firm liabilities, are bound to respect the position of the retiring member as a surety. As stated in Crane, *supra* (pp. 349, 350):

"As to whether the partnership creditor who is notified of the arrangement is thereafter subject to the limitations incident to the law of suretyship in his dealings with the principal debtor, the authorities are in conflict. * * *. The Uniform Partnership Act has adopted the view supported by the majority of the decisions that the creditor with notice must be held to the same limitations as if the situation had existed from the outset, that he must act in accordance with the legal incidents of the suretyship relation, so that alteration of the nature and time of payment, as between the creditor and the continuing partner, discharges the retired partner."

The rationale underlying the recognition which the law gives a retiring member of a partnership under such circumstances as a surety was explained by the court in *Smith v. Sheldon*, *supra*. In that case Smith, Place, and Owen were partners and became indebted to Sheldon and another for \$969 on book account. The firm dissolved and Place took over the assets and assumed liability for the debts of the firm. He notified the creditors of this arrange-

ment. They subsequently took from Place a promissory note for the amount of the debt payable at one day's demand with 10% interest. Place did not keep up the interest payments on the note and in due course made an assignment for the benefit of creditors. The creditors, Shelden and another, then demanded payment of the old partnership debt from Smith. This was the first notice Smith had received that he was looked to by the creditors for payment. In holding that Smith occupied the position of a surety and that he was released from liability by the action of the creditors in extending the time for the payment of the debt without notice to or consent from Smith, the court said (35 Mich. at p. 48, 24 Am. Rep. at p. 533):

"It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

* * * * *

"That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the co-partnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely."

In the instant case there was an adequate basis in the testimony for the jury to have made the essential findings which under the above-described principles of law would have entitled the defendant White to the rights of a surety in relation to the debt which the plaintiff had been unsuccessful in recovering from Noakes and Neubauer.

2. The Jury Could Have Found That Plaintiff Extended the Time of Noakes and Neubauer for Payment of the Partnership Debt by His Acceptance of Promissory Notes With Due Dates Extending Serially for More Than a Year Beyond the Due Date, Thereby Releasing Defendant White From Responsibility for Payment of the Debt.

From the testimony in evidence, the jury could have found that

(a) The principal sum due plaintiff by the partnership of White, Noakes and Neubauer was the \$22,515 fee for the Costa Rican hospital job (JA 12, 13);

(b) That fee became due and payable at least by June 1957 when plaintiff submitted a statement for payment of the same to Noakes and Neubauer (JA 13, 17, 42);

(c) After repeated billings and telephone calls to Noakes and Neubauer for payment of the Costa Rican hospital fee, plaintiff accepted a series of twelve promissory notes from Noakes and Neubauer for payment of the fee over a period of twelve months commencing November 1, 1957, through October 1, 1958 (JA 17, 20, 33, 42, 43, 45-48);

(d) Plaintiff never demanded payment of this fee from defendant White, nor did plaintiff give defendant White notice of the failure by Noakes and Neubauer to pay the fee until a meeting of the latter's creditors in April 1958, or of plaintiff's extension of the time for payment to Noakes and Neubauer through the acceptance of promissory notes from them (JA 20, 21, 23, 27).

If a creditor of the old partnership is notified of the withdrawal of a member and the assumption by the remaining partners of liability for the firm debts, he may not subsequently have dealings with the partners assuming to pay the debts which violate the rights of the retiring partner, who is secondarily liable as a surety. As stated in 40 Am. Jur. 279, Partnership, § 215,

"According to many authorities, when a partner transfers his interest in the partnership assets to another and retires from the partnership, he occupies the position of a surety not only as between himself and the continuing partners, but as to all others who have had dealings with the partnership to whom notice of the new contract has been brought. Under this rule, creditors are bound to respect the suretyship relations thus existing, and any dealings with the partner assuming to pay the debts must be had with due regard to the rights of the retiring partner as surety, or he will be discharged, and if a creditor thereafter shows to the partner assuming the debts any indulgence which would discharge a surety, such as an extension of the time for payment of the firm indebtedness, discharges the retiring partner."

In accordance with this rule, it has been held that a person who has retired from a partnership is discharged from liability for a debt incurred while he was a partner where the creditor, knowing of the agreement between the partners for the assumption by the remaining partners of liability for partnership debts, consented without notice to the retiring partner to a material alteration in the nature of and time of payment of the partnership obligations. *Preston v. Garrard, supra*; *Stapler v. Anderson, supra*; *Smith v. Shelden, supra*; *People ex rel. Little v. Grant, supra*; *Union Life Insurance Co. v. Hanford, supra*; *Vary v. Norton, supra*; *Scott v. Scruggs, supra*; *Leithauser v. Baumeister, supra*; *Millerd v. Thorn, supra*; *Colgrove v. Tallman, supra*; *Ludington v. Bell, supra*; *Faricy v. J. S. Brown Mercantile Co., 87 Colo. 427, 288 P. 639*; *Heller*

v. *Mattar*, 135 F. Supp. 767 (D.C., W.D. Ark.); *United States v. Ross*, 176 F. Supp. 932 (D.C., D. Neb.); cf. *Sorenson v. United States*, 226 F. 2d 460 (9th Cir.) (enforcing liability on the ground that the creditor there had no notice of the assumption of liability for partnership obligations by the remaining partner).

Even though the giving of notes for a pre-existing indebtedness of a partnership by the surviving members of a firm may not serve to cancel the original indebtedness (whether or not it does is a question for the jury, Anno. 35 LRA (NS) 57), absent a contrary intention of the parties, it has been held that such a transaction extends the time of payment of the original indebtedness. *Heiden v. Beuttler*, 11 F. Supp. (D.C., N.D. Iowa). Such an extension, being for a definite period of time, and based upon consideration, if given without prior notice to the surety is sufficient to release the surety from liability for the indebtedness. *Clark v. Gerstley*, 26 App. D.C. 205, *aff'd*, 204 U.S. 504; Stearns, Law of Suretyship (Elder's Revision, 5th ed.), sec. 6.22; Restatement, Security, sec. 129(1), Comment a; 50 Am. Jur. 944, Suretyship, sec. 58; 950, sec. 63. As stated in 50 Am. Jur. 950, Suretyship, sec. 63:

"The rule that an extension of time to the debtor without the surety's consent will release the latter is not ordinarily affected by the length of time of the extension, and the surety may be discharged even though the extension is for a short or limited time only. A suspension for a month, or even a day, is as effectual to release the surety as one for a year or two years."

Further, though there is a conflict of authority, the prevailing rule, as stated in 50 Am. Jur. 952, Suretyship, sec. 66 "is that the acceptance of a new note after the maturity of a debt is evidence of such an agreement to extend the time of payment as will discharge the surety." The acceptance of promissory notes would also be tantamount to an agreement by the plaintiff to postpone enforce-

ment of the original indebtedness until the due date of the notes. This, equally with an extension of time, releases a surety without notice. *Zastrow v. Knight*, 56 S.D. 554, 229 N.W. 925, 72 A.L.R. 379; Anno. 9 LRA (NS) 88, 90, 92.

Moreover, it has been held that assent by a creditor to an arrangement such as that made in the instant case, followed by acceptance by the creditor of notes from the continuing partner or partners, releases the former partner. *Hauge v. Bye*, 51 N.D. 848, 201 N.W. 159, 36 A.L.R. 613. While plaintiff did not enter into an agreement to release the defendant White, he was advised of the assumption of responsibility for the partnership debts by Noakes and Neubauer and of the arrangement holding defendant White harmless from these liabilities. He assented to these arrangements by his conduct in thenceforth looking solely to Noakes and Neubauer for payment, and in accepting promissory notes from them as a systematic means for securing the payment of the debt owed to him.

For the acceptance by the creditor of a promissory note from the primary debtor to operate as an extension of time which, without notice to the surety, will release the surety from liability, it is not necessary that the pre-existing debt be extinguished or that there be any separate agreement by the creditor not to enforce payment of the pre-existing debt. This was discussed in *Preston v. Garrard*, *supra*, as follows (120 Ga. at p. 691, 48 S.E. at p. 119):

"The earliest case on the subject is that of *Stone v. Chamberlain*, 20 Ga. 259. It was there held that where a creditor of a partnership, with knowledge that it had been dissolved by the retirement of one of the members, took a note in renewal of another given by the firm before the dissolution, and extended the time of payment of the original indebtedness, without the knowledge or consent of the retiring partner, he would be discharged. There was nothing to show that the renewal note was expressly taken in settlement of the old indebtedness. * * * The only effect of the new

note, therefore, so far as the retiring partner was concerned, was to extend the time of payment of the old indebtedness; and this extension operated as a release of the retiring partner. * * * * * when the case was again before this court * * * Judge Benning said: 'The taking of the new note by the plaintiff was, at least, a suspension of their right to demand payment of the debt, until the new note fell due; and therefore the effect was to put the debt in such a condition that Stone would not longer have the right to pay it up immediately, and demand contribution from Johnson, but would have to wait till the note fell due, before he could pay it up and demand contribution.' "

The mere acceptance by the creditor from the primary debtor of a promissory note in the amount of the pre-existing debt is sufficient to bring about such an extension of time as will release a surety who was given no notice of the extension. *United States v. American Bonding & Trust Co.*, 89 Fed. 921 (C.C., D. Md.), affirmed 89 Fed. 925 (4th Cir.). This is well illustrated by *People ex rel. Little v. Grant, supra*. In that case Grant had a running account with Little for materials. Two persons were sureties upon a bond for payment by Grant for labor and materials used in the performance of a public contract. Little kept a monthly balance of sums due from Grant, and monthly statements were sent to Grant. In due course of time Grant gave Little a promissory note for \$1,500 payable in one month with interest at 6%. The amount which Grant then owed Little on open account was \$3,243. No notice was given to the sureties. Subsequently, action was brought by Little against Grant and the sureties for the amounts on open account remaining unpaid. The trial court held that the sureties were not liable for \$1,500 and interest, the amount of the note. On appeal Little contended that there was no consideration for the extension of time which had been relied upon by the court below in releasing the sureties, nor was there an agreement by Grant not to pay the underlying debt before the maturity

of the note, or by the plaintiff not to sue on the original claim. The appellate court rejected these contentions and held that the sureties were not liable, stating (138 Mich. at p. 62, 100 N.W. at p. 1007):

"Here the debtor gave his promissory note, whereby he promised to pay at a given time a debt that he had previously incurred. Under ordinary rules, he had no right to pay it before it was due, if it was a note based upon a consideration, and of that there is no doubt. An existing debt is good consideration for a promise to pay, and it would be a surprise to business circles, were we to hold that a note given for an existing debt, whether due or not, was not based on an adequate consideration; and it would be equally a surprise were we to hold that, notwithstanding the note, the debtor might pay, or the creditor enforce payment, at any time. The inference to be drawn from the circumstances is that Grant was largely in debt on February 7th to the plaintiff. It was not convenient for him to pay money, and he was asked to give a bankable paper, which he did, and it was negotiated. There can be no doubt that both parties expected and understood that the amount represented by that note should not be paid or collected sooner than the time fixed in the note, and contracted to that end, as the terms of the note itself implied. We are aware that there is a want of harmony in the authorities upon this point, but we think the weight of authority sustains our conclusion. It is probable that the amount for which the note was given was due on February 7th, but, if not due at that time, * * * an additional consideration for the extension was the promise to pay interest before the expiration of 30 days."

These authorities establish that the mere acceptance by the creditor from the principal debtor of promissory notes in the amount of a pre-existing debt payable at a future date is tantamount to the making by the creditor with the principal debtor of an agreement to extend the time for payment of the debt, and that this releases the indemnified retiring partner without notice who occupies the

position of a surety. In an action by the creditor against the retiring partner, the latter is entitled to have the case go to the jury on the issue of whether or not the facts material to withdrawal from the partnership, assumption of liability by the continuing partners for firm debts, notice to the creditor, and extension of time or other change in the nature and time for payment of the debt was granted by the creditor to the principal debtor without notice to the former partner-surety. If the jury finds such facts, they establish that the withdrawing partner-surety is released and free of liability for the debt. As stated by the court in *Millerd v. Thorn, supra* (56 N.Y. at p. 406):

"I think the defendant was entitled to have the jury instructed * * * that if the plaintiffs extended the time of payment of the debt to Smith until the note given by him therefor matured, Thorn was thereby discharged. By the agreement of Smith upon the dissolution of the partnership between the defendants, to assume and pay the debt due the plaintiffs, he became, as between him and Thorn, principal debtor, and the latter his surety for payment. If the plaintiffs, with knowledge of these facts, made a valid agreement with Smith to extend the time of payment, they thereby discharged Thorn."

Had the court below allowed the case to go to the jury, the latter could have found from the evidence that the plaintiff extended the time of the principal debtors Noakes and Neubauer to pay the indebtedness from the original due date for the lump sum of June 1957 to a monthly payment basis commencing in November 1957 extending through October 1958, and that this extension, granted through the acceptance of the twelve promissory notes, was without notice to the defendant White. In this event, a verdict in favor of the defendant White would have been required.

3. The Jury Could Have Found That in View of the Withdrawal of Defendant White From the Partnership With Noakes and Neubauer, and the Assumption by the Latter of the Liabilities of the Old Firm, the Plaintiff's Conduct in the Light of His Knowledge of These Arrangements in Looking Exclusively to Noakes and Neubauer for Payment as Manifested by the Manner in Which the Principal Debt Was Invoiced, and by His Acceptance of Promissory Notes From Noakes and Neubauer Without Reference to Defendant White, Constituted a Waiver of His Rights to Hold Defendant White Liable, or Alternatively an Acceptance of the Liability of Noakes and Neubauer in Place of the Liability of the Old Firm.

From the testimony in evidence, the jury could have found that

(a) Plaintiff had knowledge of defendant White's withdrawal from the firm of White, Noakes and Neubauer (JA 19, 23);

(b) Noakes and Neubauer assumed responsibility for the debts of the firm, and agreed to hold defendant White harmless from such liabilities (JA 26, 27);

(c) Plaintiff willingly accepted the liability of Noakes and Neubauer in place of that of White, Noakes and Neubauer, and elected not to look to defendant White for payment as shown by the manner of billing Noakes and Neubauer and the acceptance of promissory notes only from them for the debt (JA 42, 43, 20).

It has been held that "courts have frequently held that, when the dissolution of an old firm has occurred, and a new firm has agreed to assume the liabilities of the old firm, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has notice of the dissolution and of the agreement by the new firm, to accept the liability of the new firm in place of the liability of the old." *Regester v. Dodge*, 6 Fed. 6, 9 (C.C., E.D.N.Y.). There the failure of the

creditor to object to the substitution of the liability of the new firm for the old, coupled with delay in enforcing his claim against the old firm, was regarded as a sufficient circumstance to show that the creditor intended to look solely to the new firm for payment. The failure of the creditor under similar circumstances to look to the retiring members of a firm for payment of an indebtedness of the firm until it was plain that those who had assumed liability for the firm's debts were unable to pay the claim was held to establish that the creditor had elected to accept a substitution of debtors which precluded recovery against the former members of the partnership. *Gillet v. Ivory*, 173 Mich. 444, 139 N.W. 53. There the period of time from assumption of liability of the old firm's obligations by the new firm until its insolvency was only six months. This type of conduct, sufficient to bar recovery against the retiring member of the partnership, may be regarded as giving rise to a novation, or as simply amounting to a waiver wherein the creditor voluntarily relinquishes his right to hold the former member of the firm to the liability of a partner. Cf. *Gillet v. Ivory*, *supra*.

The waiver once made is irrevocable. 56 Am. Jur. 126, Waiver, sec. 24. It need not be express, but may be implied by conduct. *Dunbar v. Farnum*, 109 Vt. 313, 196 Atl. 237, 114 A.L.R. 996. The question of intent is usually one of fact, and may be inferred from the party's acts or words. *Eastman v. Pelletier*, 114 Vt. 419, 47 A. 2d 298.

The jury could have found in the instant case that when plaintiff learned from defendant White of his withdrawal from the partnership, the assumption of the firm's liabilities by Noakes and Neubauer, and the arrangement that defendant White would be held harmless from such liability, the plaintiff's subsequent conduct in looking only to Noakes and Neubauer for payment implied an intention on his part to waive his right to look to defendant White for payment of the debt. See *Regester v. Dodge*, *supra*.

The conduct of the plaintiff is to be viewed in the light of all the facts, including the purpose of the arrangements made at the time of defendant White's withdrawal to relieve him of liability for the partnership's debts. There is no fact of record which shows that prior to the creditors' meeting in April 1958 the plaintiff intended to look to the defendant White for the payment of the amount owed to him by the partnership. On the other hand, many facts of record provide a clear basis for inferring an intent on plaintiff's part *not* to look to the defendant White for payment: his silence or failure to protest when defendant White told plaintiff of the arrangement with Noakes and Neubauer (JA 25-27); plaintiff's consistent billing of "Noakes & Neubauer" for the Costa Rican hospital fee (JA 42, 43); plaintiff's acceptance of promissory notes from only Noakes and Neubauer, and his express intent not to ask defendant White to sign (JA 20, 21). Such facts are inconsistent with an intent to hold the defendant White, and provide a sufficient basis for the jury to have found that plaintiff waived his rights against defendant White. *Albertson v. Bray Wood Heel Co., Inc.*, 113 Vt. 184, 32 A. 2d 125.

There was sufficient evidence on the issue of waiver to warrant the submission of the case to the jury, and the court below erred in not overruling the plaintiff's motion for a directed verdict. *Mears v. Farmers Cooperative Fire Ins. Co.*, 112 Vt. 519, 28 A. 2d 699.

CONCLUSION

As indicated under each point of appellant's argument, there are questions of fact in this case on which, under settled principles of law, the ultimate decision of liability depends. These are issues which are "within the province of the jury to decide," and the trial court erred in directing a verdict. *Loketch v. Capital Transit Co.*, 101 App. D.C. 289, 248 F. 2d 611; *Peigh v. Baltimore & Ohio R.R.*, 92 App.

D.C. 198, 204 F. 2d 391. On this appeal the evidence must be considered in the light most favorable to the appellant, *Furr v. Herzmark*, 92 App. D.C. 350, 206 F. 2d 468; *Peigh v. Baltimore & Ohio R.R.*, *supra*, according him the benefit of every legitimate inference. *Chambers v. Tobin*, 92 App. D.C. 274, 204 F. 2d 732; *Furr v. Herzmark*, *supra*. The evidence so considered, under the controlling principles of law discussed in this brief, requires reversal of the judgment of the trial court and a remand of the case for a new trial.

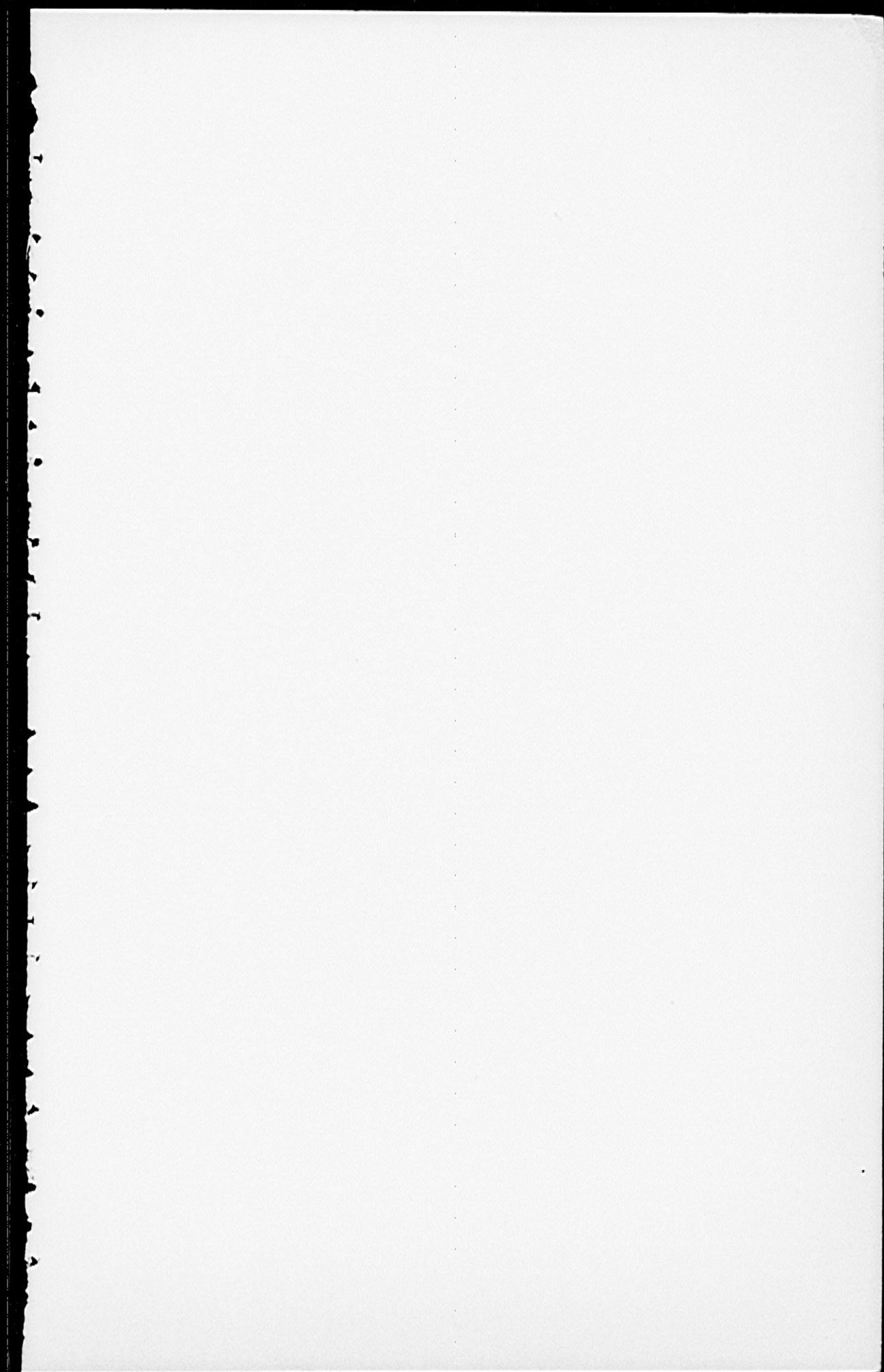
Respectfully submitted,

EUGENE L. STEWART
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

Counsel for Appellant.

HUME & STEWART

Of Counsel



APPENDIX

INDEX TO JOINT APPENDIX

	Page
Complaint for Judgment for Services Rendered	1
Answer of Defendant John J. White	2
Docket Entry of January 16, 1959	2
Pre-Trial Statement of Plaintiff, William A. Brown ..	3
Pre-Trial Statement of Defendant John J. White, Jr. ..	4
Pre-Trial Proceedings	7
Verdict and Judgment	8
Notice of Appeal	9
Excerpts from Transcript of Proceedings	10
Opening Statement on Behalf of Plaintiff	10
Opening Statement on Behalf of Defendant	10
Testimony of William A. Brown	11
Testimony of Donald J. Neubauer	31
Testimony of John Jamieson White, Jr.	24
Defendant's Answer to Plaintiff's Motion for Directed Verdict	35
Exhibits	42
Plaintiff's Exhibit 1	42
Defendant's Exhibit 1	42
Defendant's Exhibit 2	42
Defendant's Exhibit 3	43
Defendant's Exhibit 4	43
Defendant's Exhibit 5	44
Defendant's Exhibit 6	44
Defendant's Exhibits 7-18	45-48

JOINT APPENDIX

[Filed June 19, 1958]

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 1593-'58

WILLIAM A. BROWN, 1223 Connecticut Avenue, N. W., Wash-
ington, D. C.,

Plaintiff,

vs.

(1) JOHN J. WHITE, 1145 - 19th St., N. W., Room 417, (2)
EDWARD H. NOAKES, 1145 - 19th St., N. W., (3) DONALD
J. NEUBAUER,

Defendants.

Complaint for Judgment for Services Rendered

1. The jurisdiction of this honorable Court is predicated upon the amount in controversy and the relief requested.

2. The defendants owe the plaintiff twenty-one thousand, six hundred and sixty-one dollars and forty-five cents (\$21,661.45) for engineering services rendered by the plaintiff for and on behalf of the defendants at their special instance and request, plus interest thereon from August 30, 1957.

Wherefore, the premises considered, plaintiff demands judgment against the defendants for the full sum of twenty-one thousand, six hundred and sixty-one dollars and forty-five cents (\$21,661.45) plus interest thereon from August 30, 1957, plus costs.

HARRY SAIDMAN

Harry Saidman

521 Colorado Building

Washington, D. C.

District 7-6527

Attorney for Plaintiff

[Filed August 18, 1958]

Answer of Defendant John J. White

FIRST DEFENSE

Defendant John J. White denies that he owes plaintiff the sum of \$21,661.45, or any sum whatever.

SECOND DEFENSE

Defendant John J. White avers that plaintiff accepted promissory notes from defendants Edward H. Noakes and Donald J. Neubauer in payment of the indebtedness on which this suit was brought. These promissory notes were accepted by plaintiff with the intention of releasing defendant John J. White from any responsibility which he might have had to plaintiff, and a novation was thereby created.

HUDSON & CREYKE

By J. M. B.

J. Mitchell Brown

Attorneys for Defendant

John J. White

400 Washington Building

Washington 5, D. C.

Defendant John J. White demands a jury trial of the issues raised herein.

HUDSON & CREYKE

By J. M. B.

J. Mitchell Brown

Docket Entry of January 16, 1959

"Judgment for pltf. vs. defts. Donald J. Neubauer and Edward H. Noakes in sum of \$21,661.45, with interest from Aug. 30, 1957, plus costs. (N)

McGUIRE, J."

Pre-Trial Statement of Plaintiff, William A. Brown

1. The plaintiff's claim is predicated upon an open account for services rendered.

2. The plaintiff is a consulting engineer. The defendants, WHITE, NOAKES & NEUBAUER were architects and engineers. They employed the services of the plaintiff in connection with several jobs, the following of which were unpaid:

(a) Post Exchange and Dispensary job, Verbal Agreement for	\$5,000	
Payments received	\$4,969.43	
Balance		\$ 30.57
(b) Nacional de Ninos Hospital Written Agreement by letter dated 9-17-56		22,015.00
(c) Atomic Energy Commission job Verbal Agreement for cost plus 80% overhead, plus lump sum \$1600.00		4,599.53
TOTAL		<u>\$26,645.10</u>

CREDITS:

Gordienko and Saborio	\$ 500.00	
Tangiers Account..	4,483.65	
TOTAL CREDITS		<u>4,983.65</u>

BALANCE DUE FOR WHICH SUIT WAS FILED \$21,661.45

3. After these debts were incurred, the plaintiff was not notified that the defendant White had withdrawn until several months after the actual retirement of Mr. White from the partnership. The plaintiff claims that the Defendant White has never been released by the plaintiff from his obligation to the plaintiff and that any theory of novation is not supported by consideration.

4. Thereafter, the plaintiff performed further services for Noakes and Neubauer and not receiving payment, requested and secured from the said Noakes & Neubauer a series of notes as evidence of their indebtedness to him.

5. When the notes were not paid, suit was filed on the original obligation against White, Noakes & Neubauer, only for the debt due plaintiff from said partnership and Judgment has been secured by the plaintiff against Noakes & Neubauer for the amount claimed.

6. There have been certain credits earned by Noakes & Neubauer after the suit was filed which has reduced the obligation by \$1,002.18, so there is now due and unpaid from defendant, White, \$21,661.45 plus interest from August 30, 1959, plus costs, less credit of \$1,002.18.

REQUESTED STIPULATIONS

1. That the partnership of White, Noakes & Neubauer had contracted for the services rendered by the plaintiff upon which this suit is predicated.

2. That said services were fully completed and performed.

3. That payment therefor, as herein set forth, has not been received by the plaintiff.

Respectfully submitted,

HARRY SAIDMAN
Harry Saidman

Pre-Trial Statement of Defendant John J. White, Jr.

1. Defendant John J. White, Jr., denies that he owes Plaintiff the amount claimed in the Complaint or any amount whatever.

2. Defendant John J. White, Jr., further alleges that on January 2, 1957, an agreement was executed between the

three co-defendants herein providing for the withdrawal of Defendant John J. White, Jr. from the then existing co-partnership of White, Noakes & Neubauer. Under paragraph IV of said withdrawal or dissolution agreement, Messrs. Noakes and Neubauer agreed to assume all contractual or other obligations of the firm of White, Noakes & Neubauer, to complete all contracts in the name of that firm satisfactorily, to pay off all obligations of that firm, and to hold Mr. White harmless and indemnify Mr. White against any liability under any contractual obligations of the firm of White, Noakes & Neubauer.

3. Plaintiff was sent notice of the withdrawal of Mr. White and that Noakes and Neubauer "were successors to White, Noakes & Neubauer." Plaintiff admits receiving such a notification card about April 1, 1957. Furthermore, Plaintiff was told shortly thereafter by Donald J. Neubauer of the contract of Noakes & Neubauer to assume all debts of the partnership of White, Noakes & Neubauer. Furthermore, that Plaintiff knew of the contract of Noakes & Neubauer to assume the debts and contracts of the old partnership and intended to release White at least as to unfinished contracts is evidenced by the fact that Plaintiff's statements on the "National de Ninos Hospital" job, on which he now claims \$22,015.00, and the Atomic Energy Commission job, on which he now claims \$4,599.53, were sent addressed to Noakes & Neubauer at least as early as June 6, 1957. At the same time, Plaintiff apparently still intended to hold White responsible for the PX and Dispensary job, which had been completed long prior to dissolution of the partnership, because he continued to send statements on this job addressed to White, Noakes & Neubauer. On September 27, 1957, the sum of \$2,969.43 was paid to Plaintiff on the Post Exchange and Dispensary job leaving a balance of \$30.57.

Several times during the period between June and September 28, 1957, Plaintiff agreed to an extension of time for payment by Messrs. Noakes and Neubauer of the bills

on the "National de Ninos Hospital" job and the Atomic Energy Commission contract, knowing that Messrs. Noakes and Neubauer were receiving large sums of money during that period from these jobs sufficient to pay the debts to him.

4. On September 28, 1957, Plaintiff, having demanded legal recognition of the debts to him, prepared a series of promissory notes totaling \$23,400.00 which were executed by Messrs. Noakes and Neubauer. This was done with the full knowledge of the contractual assumption by Messrs. Noakes and Neubauer of all of the debts of White, Noakes & Neubauer and was done only one day after the last bill on which Mr. Brown had been billing Mr. White was paid, except for \$30.57. The series of promissory notes extended the time of payment over a period of twelve months beginning November 1, 1957. Defendant White was never consulted about these notes and was not asked to sign them.

5. On April 14, 1958, Mr. White was advised for the first time by Mr. Saidman, Counsel for Plaintiff, that he was being looked to for payment of the debt to Plaintiff. However, by that time the extensions of time agreed to by Plaintiff had already prejudiced Defendant White since sums of money large enough to pay off the debt to Plaintiff had been received by Messrs. Noakes and Neubauer and applied to obligations on which Mr. White had no possible obligation.

6. As a matter of law, the extensions of time and acceptance of the promissory notes by Plaintiff with the obvious intention of releasing Mr. White and knowledge of the assumption of indebtedness by Messrs. Noakes and Neubauer constituted a novation and release of Defendant John J. White, Jr. from any obligations to Plaintiff.

REQUESTED STIPULATIONS:

1. Mailing and receipt of statements by William A. Brown to Noakes & Neubauer dated June 6, 1957; August

3, 1957; October 1, 1957; October 2, 1957; April 10, 1958, to be initialed by the Pre-Trial Judge.

2. Mailing and receipt of statements by William A. Brown, addressed to White, Noakes & Neubauer, dated June 1, 1957; August 3, 1957; October 2, 1957, to be initialed by the Pre-Trial Judge.

3. Receipt by William A. Brown of a check from Noakes & Neubauer on or about March 12, 1958, in the amount of \$2,084.35.

Respectfully submitted,

HUDSON AND CREYKE

By _____
J. MITCHELL BROWN

[Filed November 4, 1959]

Pre-Trial Proceedings

STATEMENT OF NATURE OF CASE:

Action for compensation for services.

Details of the claim are set forth in annexed statement. As to job (c) the amount claimed is computed as follows: engineering and drafting costs—1664.63; 80% overhead—1331.70; traveling expense—3.20; engineering fee—1,600.00; total \$4,599.53.

D admits that the P was employed but denies knowledge that he performed all of the services claimed. D admits the written agreement of Sept. 17, 1956, relating to job (d), but denies knowledge as to whether all the services were performed.

As to Job (c) D admits an agreement, but denies knowledge as to its terms or as to whether the services were performed.

Other defenses are stated in annexed pretrial statement.

The D claims novation; the details of which are contained in annexed statement.

It is stipulated that documents initialed by the Pre-trial Judge may be admitted in evidence without formal proof subject to objection as to relevancy and competency, and that they were mailed and received by the addressees.

S/ ALEXANDER-HOLTZOFF
Judge

ATTORNEYS:

S/ HARRY SAIDMAN
S/ J. MITCHELL BROWN

Verdict and Judgment

This cause having come on for hearing on the 19th day of January, 1960, before the Court and a jury of good and lawful persons of this district, to wit:

Marion E. Young	Donald Hamburger
Raymond I. Algee	Wesley J. Fredette
Ralph M. Walker	George J. Cooper
Elva McCaffrey	Blanche O. Krapick
Eugenia E. Sheats	David B. Lipscomb, Sr.
Bertrand P. Ramsay	Charles R. Irvine

who, after having been duly sworn to well and truly try the issues between William A. Brown, plaintiff and John J. White, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 20th day of January, 1960, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Twenty thousand six hundred fifty-nine and 27/100 Dollars, with interest from August 30, 1957, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Twenty thousand six hun-

dred fifty-nine and 27/100 Dollars, with interest from August 30, 1957, by direction of the Court together with costs.

HARRY M. HULL,
Clerk,

By HUGH E. KLINE
Deputy Clerk.

By direction of
JUDGE LEONARD P. WALSH

[Filed February 19, 1960]

Notice of Appeal

Notice is hereby given this 19th day of February, 1960 that defendant John J. White, Jr., hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of January, 1960 in favor of plaintiff William A. Brown.

HUME & STEWART
By /s/ KARL E. BAKKE
Karl E. Bakke
*Attorney for John J.
White, Jr.*

* * * * *

6 EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Opening Statement on Behalf of Plaintiff

Mr. Saidman: The plaintiff's case is simple, the plaintiff is an air conditioning electrical engineer. He fills in on plans for large buildings, air conditioning, heating and electrical work that goes into the plans. He was hired by a firm known as White, Noakes and Neubauer, who are composed of three persons: Mr. White, who is the defendant; Mr. Noakes, who was also a defendant and against whom a judgment has been secured; and Mr. Neubauer, who was also a defendant and against whom a judgment was secured.

* * * * *

7 Opening Statement on Behalf of Defendant

Mr. Bakke: May it please the Court, ladies and gentlemen of the jury, my name is Bakke, I represent the defendant John Jamieson White and I would like to say at this time that, as you all know, there are two sides to every story. The plaintiff will put on his case first, we will not be permitted to put in any evidence until the plaintiff has concluded his case and I ask only that you keep an open mind on the subject matter of this suit until you have heard all the evidence.

Now, our defense is very simply this: That whereas Mr. White was admittedly a partner in the architectural firm of White, Noakes and Neubauer at the time that Mr. Brown's services were undertaken, shortly after these services were undertaken Mr. White left the firm and we will show, we will put in evidence and show that subsequent to Mr. White's departure from the firm, Mr. Brown by his own conduct released Mr. White from any further obligation on the liability for his fees.

Thank you.

* * * * *

8

William A. Brown

the plaintiff, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Saidman:

Q. Mr. Brown, what is your full name? A. William A. Brown.

Q. What is your occupation? A. I am a consulting engineer.

The Court: Mr. Brown, if you lean a little bit forward and speak into that microphone, it will catch your voice.

By Mr. Saidman:

Q. Do you specialize in any type of engineering? A. We do mechanical and electrical work for buildings.

Q. And how long have you been engaged in business as an engineer? A. Oh, I have been in this business all my life, ever since I graduated; this particular office in Washington for about fifteen years.

Q. And prior to that, about how long? A. Well, I have been in the business actually since 1923, which is the year of my graduation as an engineer.

Q. Did there come a time when you entered into an agreement with a firm known as White, Noakes and Neubauer, to do some work for them? A. Yes.

Q. Directing your attention to the Post Exchange and Dispensary job, did you enter into an agreement with the firm to do that job and, if so, for how much? A. Yes, we did the mechanical and electrical design on that job and I believe the agreed on price was \$7,000, if my memory is correct.

* * * * *

Q. Would this help refresh your recollection? A. I stand corrected, the agreement apparently was for \$5,000.

Q. Would that help refresh your recollection as to the details of the job? A. Yes, it certainly will.

* * * * *

Q. Referring to the notes, how much is due to you, what agreements were made by you and the firm of White, Noakes and Neubauer for work to be done by you
10 for them? A. We were to prepare the mechanical and electrical drawings and specifications.

Q. For what jobs? A. For this Post Exchange and Dispensary job.

Q. For how much? A. For the sum of \$5,000.

Q. Was that done? A. That was done, yes.

Q. Did you complete your work? A. Oh, yes.

Q. And has it been paid for? A. There is a small balance of \$30.57.

Q. Was there any other agreement made for any other job with White, Noakes and Neubauer? A. Yes, the next one was the National de Ninos Hospital.

Q. What were the terms of that agreement? A. That was for the lump sum of \$22,015.

Q. Was that agreement in writing? A. Yes, we had a letter contract on that.

Q. And is this the agreement under which you proceeded with your work? A. Yes, that is correct.

Mr. Saidman: I would like to introduce this in evidence.

The Court: Any objection?

Mr. Bakke: No, Your Honor.

11 The Court: It will be received without objection, marked Plaintiff's Exhibit No. 1.

(Letter dated September 17, 1956, to White, Noakes and Neubauer from W. A. Brown, was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Mr. Saidman: May I read from this to the jury?

The Court: You may.

Mr. Saidman: This is a letter to White, Noakes and Neubauer, dated September 17, 1956, re Hospital Nacional de Ninos, San Jose, Costa Rica:

"Gentlemen:

"In confirmation of our verbal understanding, I am commissioned to prepare plans and specifications for plumbing, air conditioning, ventilation, and electrical work for the above job.

"The Engineering fee for this work shall be the lump sum of \$22,015.00. This is based on 3½% of the estimated cost of \$629,000.00 to the Owner for mechanical and electrical work. Proportionate payments shall be made to the Engineer at the time the Architect receives his payments. Final payment shall be due on completion of plans and specifications.

"Yours very truly,

"William A. Brown"

"Accepted: Donald J. Neubauer"

By Mr. Saidman:

12 Q. Now, when this was accepted, Mr. Neubauer was one of the partners of the firm of White, Noakes and Neubauer? A. That is correct.

Q. Did you do that work? A. Yes.

Q. Was it entirely completed? A. Yes.

Q. Approximately when was that completed? A. That I believe was completed in February 1957.

Q. Was there any complaint or anything wrong with the job in any way that you had done? A. No, I have never heard of any complaint.

Q. And when did the amount become due? A. Well, the final payment is normally due on completion of the plans.

Q. You completed the plans? A. That is right.

Q. Did you receive payment for that job? A. No.

Q. Any part of it? A. No.

Q. Did you have another agreement, any other agreement for any other work with White, Noakes and Neubauer? A. Yes, the next job was a job for the Atomic Energy Commission.

13 Q. What was the agreement with reference to that job and with whom was it made? A. Our work

was for White, Noakes and Neubauer and the agreement provided for a time card, cost plus, this is a cost plus arrangement, it was based on time card costs plus overhead plus a lump sum of \$1600 as an engineering fee.

Q. Was that job completed? A. Yes.

Q. What was the total amount due you for that job under that arrangement? A. That was \$4599.53.

Q. Was that paid? A. No.

Q. Was any part of it paid? A. No.

Q. May I see this for a minute?

Now, were there any other credits, were there any credits due on the general account of White, Noakes and Neubauer for either payments or credits of any kind to which they are entitled on these three items? A. Yes. We employed White, Noakes and Neubauer to do some work for us in connection with a job we were doing for the United States Information Service on which we needed some architectural and structural services and there was a credit due them for that work of \$4483.65.

14 Q. Was there any other credit? A. In addition to that there was a credit due them of \$500 for deductions made from the salaries of two Costa Rican engineers who came along as a condition of the National de Ninos job. These boys came up from Costa Rica for training. There were two or three architectural men who worked directly in White, Noakes and Neubauer's office and there were these two engineers, one mechanical and one electrical, who worked for us, and there was \$500 apparently which had been advanced to them for transportation and we were directed by White, Noakes and Neubauer to deduct this \$500 from their salary as they went along. And this \$500 was deducted and therefore is a credit to the firm of White, Noakes and Neubauer.

Q. Is there any other credit that is due them on this account? A. That is all on this particular account, on the White, Noakes and Neubauer account, although there is a Noakes and Neubauer account, too.

Q. Did there come a time after suit was filed when there were credits to be applied to this account? A. Yes, there were some credits that applied to this account. I couldn't give you the figures without having something to refresh my memory, but I can tell you the nature of the credits.

Q. How did that come about; that was after the
15 suit was filed? A. Yes.

Q. Is that correct? A. Yes.

Q. How did that come about? A. We employed Mr. Neubauer, he is a structural engineer, we employed him to do some work for us in connection with one of our jobs which was basically mechanical but required some structural assistance and we made arrangements with Mr. Neubauer to pay him a part of the money and apply part of the money to the indebtedness of White, Noakes and Neubauer, and that amount is roughly about \$800.

Q. Would this help refresh your recollection as to the exact amount? A. The amount actually credited to Neubauer was not \$800 apparently, it was \$683.75.

Q. What was the total amount of credit to which White, Noakes and Neubauer were entitled under this arrangement with Mr. Neubauer? A. Well, as far as Mr. Neubauer is concerned, there is a credit of \$683.75 on that particular account, but there were other credits amounting to \$318.43 to the account of Noakes and Neubauer, which adds up to a total of \$1,002.18 which may be credited to the account of White, Noakes and Neubauer.

Q. So that credit occurred after the suit was
16 filed? A. Yes.

Q. Now, will you summarize for us, please, and give us the full amount which is due to you from White, Noakes and Neubauer at the present time. A. You mean taking into account the Noakes and Neubauer account?

Q. Taking into account all the credits to which they were entitled and add up— A. I am afraid we will have to get that from the books which Mrs. Brown has back there. I wouldn't have those figures in mind, but I think by referring to the books I could give it to you. It would

probably be the amount mentioned in the suit less this \$1,002.18.

Q. The amount mentioned in the suit less the \$1,002.18?

A. That is right. You don't seem to have a summary sheet here, but I know there is a summary sheet in the books.

Mr. Saidman: With your permission, may I tell him the amount of the suit in exact terms?

Mr. Bakke: It is in the pretrial statement.

By Mr. Saidman:

Q. The amount of the suit was \$21,661.45. Would that help you? A. Well, if my subtraction is correct, \$20,659.27.

Q. When was this money due to you from White, 17 Noakes and Neubauer, can you give us a date? A.

Well, most of it, of course, was due on the completion of the National de Ninos job, which was about in February of 1957.

Q. February 1957? A. Most of that was due at that time, although the exact dates for this work would have to come—all of the work would have to come from the books, I don't have that in mind.

Q. Would you say that it was, on your own knowledge, without referring to the books, I don't want to go into details at this point, they are not too important, would you say that there was no question in your mind it was all due to you by August 30, 1957? A. Yes, I am sure it was due at that time.

Q. And was it paid at that time? A. No.

* * * * *

Cross-examination

By Mr. Bakke:

Q. Mr. Brown, you indicated that one of the items upon which you were presently suing involved your fee for a hospital job in Costa Rica? A. Yes.

Q. And the amount of that fee, I believe was something slightly in excess of \$22,000? A. Yes.

* * * * *

Q. You have also testified that you received no payments upon that account? A. No direct payments to that account, but of course there were some credits which were allowed against the entire account; no direct payments, no.

Q. How did you allocate the credits, Mr. Brown? A. There was \$4483.65 from the Tangiers account which was credited, plus the \$500 for the Gofdienko & Saborio account, for a total of \$4983.65.

Q. Those were not allocated to any particular portions of the pending account with the Noakes and Neubauer firm? A. No, this is the White, Noakes and Neubauer account.

Q. You mean to tell me you consistently looked to White, Noakes and Neubauer for the payment of the Costa Rica job? A. Certainly.

* * * * *

19 Q. Mr. Brown, you have testified here that you have consistently looked to White, Noakes and Neubauer for satisfaction of the fee on the Costa Rica job. I now show you three bills and ask you whether you recognize those bills? Are those statements on your bill form? A. I would assume that, I can't recognize them, I can't say that I ever saw these before but they are on my letterhead.

Q. I see. To whom are those bills directed? A. They are addressed to Noakes and Neubauer.

Q. I see. And the subject matter of those bills is what, Mr. Brown? A. The National de Ninos Hospital.

Q. And the amount of that bill? A. \$22,015.

Q. Now, there are three bills there, Mr. Brown. They are dated June 6, 1957, August 3, 1957, and October 1, 1957, and all three of those bills for the Costa Rica hospital job are directed to Noakes and Neubauer? A. Yes.

Q. None of the three is directed to White, Noakes and Neubauer? A. That is correct. Mr. White, by

20

that time, had notified us that he was no longer with White, Noakes and Neubauer.

Q. I see. I believe you also testified, Mr. Brown, that there was a Post Exchange and Dispensary job pending for the firm of White, Noakes and Neubauer? A. Yes.

* * * * *

Q. Mr. Brown, you have testified that the reason that those bills for the Costa Rica job were addressed only to Noakes and Neubauer is that at the time they were sent out, Mr. White had withdrawn from the firm, is that correct? A. That is correct.

Q. I now show you three additional—may I remove these—three additional bills, each of which relates to the Post Exchange and Dispensary job which you have testified was also pending. Those bills are dated June 1, 1957, August 3, 1957, and October 2, 1957, so that they are virtually contemporaneous with these three bills? A. That is correct.

Q. Now, to whom are those bills for the Post Exchange and Dispensary job addressed? A. These are addressed to White, Noakes and Neubauer.

Q. To White, Noakes and Neubauer? A. That is correct.

Q. Those bills were sent after Mr. White had withdrawn from the firm of Noakes and Neubauer? A. According to the dates, I would say so.

Q. So that you have here, Mr. Brown, the bills for the hospital job in Costa Rica representing a fee of something slightly in excess of \$22,000, which you sent only to Noakes and Neubauer, after Mr. White left the firm. We have, on the other hand, the Post Exchange and Dispensary job which was also pending at the time Mr. White left the firm, I believe you testified to that; these bills for the Post Exchange and Dispensary job were sent out at the same time as the bills for the Costa Rica hospital job and yet the bills for this Post Exchange and Dispensary job were addressed to White, Noakes and Neubauer, and

the bills for the Costa Rica hospital job were addressed only to Noakes and Neubauer. Now, you knew, didn't you, Mr. Brown, that Mr. White had left the firm of White, Noakes and Neubauer shortly after the first of the year in 1957? A. I received a card sometime after April 22 1st, that was my first knowledge of it.

Q. Now, did you—I presume you continued to deal with the firm of Noakes and Neubauer, after Mr. White left, in some fashion or another? A. Yes, to some extent, yes.

* * * * *

Q. When did these bills come due, Mr. Brown, when did the claims— A. Normally, the final payment is due on completion of the plans and these, I don't think the Atomic Energy Commission job was in arrears but the other two jobs were, they were long past due.

Q. Did you in any fashion acquiesce in the extension of time for payment of these bills? Did you deliberately permit Noakes and Neubauer to extend the time for payment? A. I did what I could to collect, but I wasn't very successful.

23 Q. But in the final analysis, you did agree in one fashion or another to periodic extensions of time?

* * * * *

The Witness: I didn't grant any time, I failed to collect. My attempts at collection were unsuccessful, let us put it that way, and as a result they continued to owe me the money.

* * * * *

By Mr. Bakke:

Q. Isn't it true, Mr. Brown, that in the fall of 1957, certain promissory notes were executed? A. Oh, yes.

* * * * *

24 Q. Mr. Brown, I show you some photostats of promissory notes and ask you whether those are

the promissory notes to which we were just referring? A. I believe they are, yes.

* * * * *

25 Q. Who executed those notes, Mr. Brown? A. Mr. Noakes and Mr. Neubauer.

Q. What was the purpose of these notes? A. The notes were drawn at the suggestion of Mr. Neubauer and he told me that they might serve the purpose of having Mr. Noakes more sensitive to his responsibilities and the payment of the indebtedness and that was his purpose, to remind him that he owed the money and to make him live up to his promise to pay with some degree of regularity.

Q. Mr. White's name is not on those notes? A. No.

Q. Now, you accepted those notes without any hesitation?

Mr. Saidman: I object.

The Witness: I hesitated when it was first suggested by Mr. Neubauer, but I accepted them.

* * * * *

Q. Now, did you at any time insist that Mr. White's name be placed on those notes? A. No.

Q. Why didn't you have Mr. White sign the notes?
26 A. Well, Mr. Neubauer—Mr. Noakes had been promising right along that he would pay and the purpose of the notes was to remind him again that he had to pay.

Q. I see. Do you recall certain interrogatories which you answered in connection with this action? A. Yes.

Q. You recall what your answer was to an interrogatory directing a question toward your reason for accepting the notes from Mr. Neubauer and Mr. Noakes and not including Mr. White on the notes? A. I don't remember what my answer was, no; unless it was similar to what I have just given.

Mr. Bakke: With your permission, Mr. Saidman, I would like to read the answer.

Mr. Saidman: Read the interrogatory first.

By Mr. Bakke:

Q. The interrogatory which you answered, Mr. Brown, was No. 18 (a): "Was Defendant John J. White, Jr. at any time asked to sign such notes?"

Your answer was "No."

18 (b): "If so, when, where and by whom?"

And, of course, that was inapplicable and you did not answer that question.

Interrogatory 18 (c) read: "If not, please explain fully why Defendant White was not asked to sign the notes."

27 And your answer, Mr. Brown, was: "I didn't care who paid the obligation of White, Noakes and Neubauer. Noakes & Neubauer promised payments. White had started new business and didn't seem financially able to pay at that time."

Do you recognize that as your answer? A. Yes, sir.

* * * * *

Q. So that the situation, Mr. Brown, at the time that these notes were executed, was that you didn't feel the defendant John Jamieson White was in a position to pay and since Noakes and Neubauer had promised payment and had been agreeing to pay the obligation right along, you accepted the promissory notes from them, and them alone? A. That is correct.

* * * * *

28 Redirect Examination

By Mr. Saidman:

Q. Were there other bills sent to White, Noakes and Neubauer, outside of these for these jobs? A. Mr. Saidman, I never see the bills that are sent from my office. With the volume of business we do, that is routine. Those are statements, actually, rather than bills and the girls merely send out statements on the basis of the books and I am sure that there may or may not have been other bills or statements sent out. As a matter of fact, we rarely send out

any bills in our business until the account is long past due. We don't send out bills or statements as a matter of fact, most of our payments are made without bills or statements.

Q. Why were these sent, do you know? A. They were long past due, they were sent because the accounts were past due and we were trying to stir them up.

Q. Why were some of them sent to Noakes and Neubauer and some to White, Noakes and Neubauer? A. That is just a clerk's choice, I don't know why one job was addressed to White, Noakes and Neubauer and the other case, it was addressed to Noakes and Neubauer, I don't know, except that the girls were in touch with the Noakes and Neubauer office and the job was still in the Noakes and Neubauer office.

Q. Did you direct the girls to eliminate White's
29 name from any of these accounts? A. No, I did not.

Q. Coming down to the notes and adding these up, they add up to \$23,400. That was more than was owed to you from White, Noakes and Neubauer, wasn't it? A. That is correct.

Q. Some of this was owed to you, then, from Noakes and Neubauer? A. Well, I don't think that that figure was accurate at the time. I think we held our meeting on a Saturday morning, I am not sure of this, but if my recollection is correct, it was a Saturday morning meeting. We arrived at an approximate figure which we said we would correct later, after we had a chance to actually check the books more carefully. I don't think that the notes are a correct figure.

Q. Did you have any understanding with them that you were going to accept these notes in payment of the account? A. No, as far as I was concerned, it was just a promise to pay monthly the amount on the face of the note and, according to Mr. Neubauer, that might help to have Mr. Noakes remember his obligations.

Q. Was there any discussion about releasing White at that time, at the time of the notes? A. There was no mention whatsoever of Mr. White.

Q. You say that you first knew of Mr. White's
30 withdrawal when you received the notice in April,
sometime in April? A. That is correct.

Q. 1958? Or 1957, was it, or '58? A. April 1957.

Q. When did you first know of any of the terms under
which Mr. White withdrew from the firm? A. I don't know
to this day what the terms of withdrawal are. I have
never known what the terms were.

Q. Did you ever see the agreement between the partners?
A. No.

Q. Was there ever any discussion with you with either
Mr. White, Mr. Noakes or Mr. Neubauer, telling you that
Mr. White is not going to be responsible for this? A. No.

Q. When was the first intimation that you had that Mr.
White was not responsible for—might not be responsible
for the debts of the partnership? A. Well, that occurred
at a creditors' meeting, Noakes and Neubauer creditors'
meeting, I believe it was in April 1958. Mr. White was
present, too.

Q. That was a year after you received the notice of the
dissolution? A. Yes, about that, and at that time either
Mr. White or an attorney representing him made a state-
ment that he didn't feel that he was responsible for
31 the debts due to contracts which were signed when
he was there.

Q. What was your reaction? A. My reaction to that
was negative. I felt that he was definitely responsible.

Q. What did you say? A. I said as much, as I recall it,
I said immediately that we most certainly would not re-
lease Mr. White from his responsibility.

Q. Did you at any time ever release Mr. White? A. No,
I did not.

Q. Were you ever approached to release Mr. White? A.
No, nobody ever suggested such a thing.

* * * * *

32

John Jamieson White, Jr.

the defendant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bakke:

Q. Would you state your name, please. A. John Jamieson White, Jr.

Q. Your address? A. My home address is 4222 Leland Street, Chevy Chase, Maryland, and my office, 1145 19th Street, Washington.

Q. What is your occupation? A. I am an architect.

Q. What was your occupation in 1956? A. Architect.

Q. Were you associated with any firm in 1956? A. Yes, sir. I was associated with the firm of White, Noakes and Neubauer.

Q. Now, did there come a time in 1956 when the firm of White, Noakes and Neubauer retained Mr. Brown's services? A. Yes, sir.

Q. Did Mr. Brown perform any services for you personally, apart from those which were to be rendered to the firm of White, Noakes and Neubauer? A. No, sir.

33 Q. Did there come a time, Mr. White, when you withdrew from the firm of White, Noakes and Neubauer? A. Yes, sir.

Q. When was that? A. January 2, 1957.

Q. And official notice of this withdrawal was——

Mr. Saidman: May I suggest that counsel refrain from leading any more.

The Court: Yes, all right.

By Mr. Bakke:

Q. When you say you withdrew on January 2d— A. Well, I will clarify that, too, to some extent. I was forced to withdraw after a dissolution was effected by my two partners, Mr. Noakes and Mr. Neubauer.

Q. What were the circumstances surrounding that?

Mr. Saidman: I object to that, Mr. Brown had no part in it. I don't think it would bind him in the slightest.

The Court: What is the relevancy to this issue?

Mr. Bakke: Well, merely background facts, Your Honor, showing the circumstances under which the dissolution took place.

The Court: Was Mr. Brown a party to it?

Mr. Bakke: No, sir, he was not.

The Court: The objection will be sustained.

By Mr. Bakke:

34 Was there notice given to Mr. Brown of your withdrawal?

* * * * * * * *

Q. Was notice given to the public at large of your withdrawal from the firm?

* * * * * * * *

The Witness: Yes, sir, I sent notices out to everyone who was interested.

By Mr. Bakke:

Q. I see. Who would that include? A. That included Mr. Brown and every other creditor.

Q. Now, I believe, Mr. White,—what did you do after the dissolution? A. I set up my own office again, I had to start from scratch.

Q. After the dissolution of the firm of White, Noakes and Neubauer, did there come a time when you saw the plaintiff William Brown? A. Yes, sir.

Q. What were the circumstances of that? A. Mr. Brown came to my office, new office, and inquired about my
35 new prospects and also what was the trouble between me and my former two partners. And I outlined, I thought in pretty good detail, exactly the circumstances surrounding the dissolution.

* * * * * * * *

37 Q. Mr. White, you testified that there was a dissolution of the firm of White, Noakes and Neubauer. Was there a written agreement to this effect? A. Yes.

* * * * *

38 Q. Mr. White, you testified that after the dissolution of the firm of White, Noakes and Neubauer, you had occasion to see the plaintiff William Brown? A. Yes, sir.

* * * * *

Q. What was the subject matter of your discussion with Mr. Brown when you saw him? A. I explained to Mr. Brown at the time that there was some friction between me and Mr. Noakes particularly, that I had taken Mr. Noakes into the firm originally, it was my firm, but that I had been forced out by this dissolution and a settlement had been effected to include the following arrangements, one, that I was to be paid a certain sum of money, \$10,000, on a basis of \$200 a week for a year, and then I was to get a proportion of the profits, thirty-five percent of the profits on all the jobs we had had, that was about
39 nine jobs, and the income looked pretty good and I accepted that sort of an arrangement. I also wanted to be sure that all creditors were taken care of and everything was taken into account at that dissolution and in that agreement, that all debts were to be paid and that was the only reason I took such a low settlement figure. Actually, I only got \$10,000 out of this and—

Mr. Saidman: Is this all part of the conversation with Mr. Brown, may I inquire?

The Witness: Yes.

Mr. Saidman: Go ahead.

The Witness: I also told Mr. Brown I was being held free and clear of all liabilities in this connection.

* * * * *

Q. Just what you told Mr. Brown during this conversation. A. I told him that all debts were to be taken

40 care of and I was to be held free and clear of any liability in connection with them, that is the firm of White, Noakes and Neubauer, and that the new firm would assume those obligations.

Q. Did you receive any bills from Mr. Brown after your withdrawal from the firm? A. No, sir.

Q. When was the first time you were aware that Mr. Brown apparently was still looking to you for payment of those partnership debts? A. April 1958, at the first creditors—when the first creditors' meeting was held, which I was a substantial creditor.

* * * * * * * * *

Q. Were you ever consulted, Mr. White, about the execution of any promissory notes? A. No, sir.

Q. For the indebtedness. Thank you.

* * * * * * * * *

Cross-examination

By Mr. Saidman:

Q. At this conversation when Mr. Brown came in to see you, isn't it a fact that he came in to wish you well?

41 A. I think that may have been, I have forgotten exactly.

Q. Don't you remember? A. Yes, he did come in to wish me well in my new business, I think that was one of the main purposes of his visit, apparently.

Q. How did it come about, then, that you started to tell him about the troubles that you had with Mr. Noakes? A. It was a natural outcome of the conversation, how did I happen to be there rather than in the firm of White, Noakes and Neubauer, which was right above us.

Q. You assured him that you had made arrangements that all debts of White, Noakes and Neubauer would be paid? A. I explained the whole thing in outline to Mr. Brown at the time.

Q. At that time you knew White, Noakes and Neubauer were or would be indebted to Mr. Brown, when they fin-

ished the jobs, in quite a sum of money? A. I knew Noakes and Neubauer would be indebted to them.

Q. You knew White, Noakes and Neubauer had hired Mr. Brown to do some work? A. Oh, yes.

Q. You knew Mr. Brown would have to do that work or else he would be in breach of contract? A. Yes.

Q. You knew he had to finish the job started by
42 White, Noakes and Neubauer? A. Yes.

Q. You wanted to be sure that he was paid? A. I knew he was going to be paid by Noakes and Neubauer at that time.

Q. How much money did White, Noakes and Neubauer have in the bank at that time? A. I have no idea.

Q. Approximately, did they have \$40,000 in the bank?
A. I have no idea. This was April—

Q. Pardon? A. This was April 1957, the last I ever saw his books was in 1956.

Q. When you withdrew in April of 1957— A. I withdrew in January 1957.

Q. But you did send notice to your creditors A. It took us about two or three months to work up all the details of the valuation of different jobs and evaluate the obligations of the firm, balance those off and work up the good will value of the firm, and a few other things such as equipment, furnishings and so forth.

Q. Wasn't that all done before you dissolved? A. It was done between January and March.

Q. But at the time you dissolved, you knew or should
43 have known of the dissolution, the details of what was owed and what was owing, before you actually dissolved? A. We had a cut-off date, we agreed on a cut-off date and it took that time to—you don't do these things overnight. While I would have preferred to have it done that way, it did take a considerable time to do it.

Q. And you remained in the office of White, Noakes and Neubauer from January until April? A. No, sir. I was in and out of the office: My name was taken off the door.

Q. When was that done? A. In February.

Q. But you did notify the creditors? A. Oh, Mr. Noakes and Mr. Neubauer sent out notices that they were the successor firm.

Q. When? A. Sometime in March, the latter part of March, something like that.

Q. Did you see those notices go out? A. Yes.

Q. Did you see one go out to Mr. Brown? A. I haven't checked them off the list, no, that was their problem.

Q. But you didn't notify the creditors of White, Noakes and Neubauer, formally, that you were out of the firm as of January 1st; you didn't notify them January 1st;
44 did you? A. No, I didn't.

Q. Did you notify him February 1st? A. No.

Q. Did you notify him March 1st? A. No, we did it as soon as we were able to effect the details of the dissolution, then we sent out the cards.

Q. Did you send out the cards? A. They were printed months before.

Q. Did you send them out? A. I sent mine out, they agreed to send theirs out, to the same people.

Q. You sent yours out to Mr. Brown? A. Yes.

Q. When was that? A. That was approximately one week after Noakes and Neubauer sent theirs out, around the first of April, 1957.

Q. So Mr. Brown testified the first notice he received of the dissolution was April 1st; that was the notice? A. Well, he should have gotten Noakes and Neubauer's notice also.

Q. You don't know whether they sent it or not; you didn't send it? A. I didn't send it, no; they sent their own notices.

Q. You don't know, of your own knowledge, that
45 they sent it? A. No, they had a couple hundred of them printed up, like I did, and I know they sent them out to a good many people, for a fact.

Q. And at the time in April, then, you had everything allocated, you knew the debts, the liabilities, the net worth and so forth, didn't you? A. By April, yes.

Q. Yet in January, you testified that you told Mr. Brown that in January you were going to be paid some ten or twenty thousand dollars for your share? A. My payments were to start in January, as of the date of the agreement, official agreement.

Q. You testified that you told Mr. Brown that you were to get \$20,000 as of January 1st? A. I said \$10,000.

Q. \$10,000 as of January 1st? A. Starting January 1st, 1957, and continuing at \$200 a week after that.

Q. So at that time in January, you should have known the assets and net worth of the business, didn't you? A. As of January?

Q. Yes, when you reached that figure of \$10,000. A. Well, actually we reached that agreement probably in March or February sometime; now, we post-dated it back and I got my payments up and paid as of January 1st.

46 Q. Your dissolution was as of January 1st? A.

That is right. There is a list of payments and the date they were made in the—

Q. As of those dates, how much money was there in the bank of White, Noakes and Neubauer? A. I have no way of telling.

Q. Don't you remember? Was it \$100,000? A. No, sir. No, sir, I don't know how much it was.

Q. Was there as much as a hundred thousand dollars? A. I don't think there ever was that much in the bank, ever.

Q. Was there \$50,000? A. There might have been; there might have been fifty, at the most.

Q. Were the payments made to you regularly as they were due? A. Well, they started petering out at the end of the year and I had difficulty collecting my own payments.

Q. And you knew at that time, didn't you, that the money that was coming to you was money that should have been paid to Mr. Brown for his debt? A. No, sir; I had obligations. There was enough money on various jobs to pay

up all the debts, including those owed to me by the firm, to take care of everything.

Q. If the firm had completed those jobs and gotten the money and realized the profit? A. True.

Q. But the money that came in on these particular jobs, you knew you were getting instead of Mr. Brown? A. Well—

* * * * *

Q. Mr. White, was the direct question ever asked by you or in your presence to Mr. Brown to release you?

* * * * *

Q. To release you from the obligation of White, Noakes and Neubauer? A. I don't remember any.

Q. Did Mr. Brown ever say to you or to anyone in your presence that he releases you from this obligation of White, Noakes and Neubauer? A. No, sir.

* * * * *

Donald J. Neubauer

called as a witness by the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bakke:

Q. Would you state your name, please? A. Donald Neubauer.

Q. And your address, Mr. Neubauer? A. My residence is 3636 16th Street, N. W.

Q. What is your occupation? A. I am a consulting engineer.

Q. What was your occupation in 1956, Mr. Neubauer? A. Well, I was the engineering partner of the firm of White, Noakes and Neubauer.

* * * * *

Q. Do you recall certain events that took place on or about the 1st of January 1957? A. I probably can.

Q. Was there any activity, unusual activity at that time with respect to the firm of White, Noakes and Neubauer?

* * * * *

The Witness: Would you restate the question?

Mr. Bakke: Yes, perhaps I can be a bit more direct.

By Mr. Bakke:

Q. Was there any activity which took place on or about the 1st of January, 1957, with respect to the partnership of White, Noakes and Neubauer? A. Yes.

* * * * *

51 Q. On or about January 1, 1957, was the partnership of White, Noakes and Neubauer dissolved? A. The dissolution agreement had not been signed as yet.

Q. I see. The dissolution, when was it effected? A. I believe the date on the document is about the 2d of January, 1957.

Q. I see. Was the plaintiff William Brown a creditor of the partnership at the time of this dissolution? A. Yes, sir.

Q. Was Mr. Brown given notice of the dissolution? A. No, he wasn't.

52 Q. He was not given notice? A. Of the dissolution at that time?

Q. Yes. A. Not that I am aware of.

Q. Was he given notice of the dissolution subsequent to January 2d? A. I don't recall any specific date or any specific instance, off-hand.

Q. Did the firm of White, Noakes and Neubauer give notice of the dissolution? A. I was out of the country for a period of three months and I believe during that time notice of dissolution was——

* * * * *

Q. Were there negotiations with Mr. Brown with respect to his status as creditor, following the dissolution of the firm of White, Noakes and Neubauer? A. Yes.

Q. Could you tell us briefly what those negotiations were? A. Well, what are negotiations? One of the negotiations, he had called us up on the phone requesting payment of the monies due and we signed those notes.

53 Q. Could you tell us the circumstances surrounding that transaction, please? A. The signing of the notes?

Q. Yes. A. Well, the purpose of the notes, as far as I am concerned, was to sort of install a bit of fiscal responsibility for the partnership in the paying of the debts they had.

Q. Who suggested the notes, Mr. Neubauer? A. Well, I believe it was probably my doing.

Q. I beg your pardon? A. I believe it was my doing, off-hand.

Q. Who prepared the notes? A. Mr. Brown prepared the notes, or his office did, I believe.

Q. Who signed the notes? A. Mr. Noakes and myself.

Q. Was there any discussion at the time the notes were signed about having Mr. White sign them? A. I recall no specific instance.

* * * * *

Cross-examination

By Mr. Saidman:

Q. Was there any discussion at that time that Mr. White was to be released from his obligations to Mr. Brown? A. I recall no specific instance.

54 Q. Was there at any time, in your presence, any arrangements whereby there was either discussion or an agreement that Mr. White was to be released from his obligation of White, Noakes and Neubauer to Mr. Brown? A. No, sir.

Q. Would you recall in January approximately how much money was in the bank of White, Noakes and Neubauer? A. Not exactly.

Q. Approximately; was it in the ten thousand— A. It would be strange if it were more than that.

Q. When the money came in on this hospital job and money did come in for payments on this hospital job, after Mr. White had withdrawn, was any of that money ever paid to Mr. Brown for his work that he did on that job? A. I don't believe so.

Q. After Mr. White had withdrawn, were you ever in a financial position to pay Mr. Brown what was due to him? A. In one lump sum?

Q. Either in one lump sum or over a period of two or three months up until the date of the signing of the notes? A. Not over a period like that.

Q. As a matter of fact, before the notes were signed, the firm was behind in the rent, weren't they? A. Yes, sir.

Q. Almost had the phone cut off, didn't they? A. 55 Yes, sir.

Mr. Saidman: That is all.

Redirect Examination

By Mr. Bakke:

Q. Mr. Neubauer, you, I believe, testified as to the reason for the execution of the promissory notes? A. My reason?

Q. Yes, and that was? A. Well, it was, as I said, to try and install a sense of fiscal responsibility for the partnership.

Q. What partnership? A. Of Noakes and Neubauer.

* * * * *

Recross-examination

By Mr. Saidman:

Q. Did you express that to Mr. Brown or was it just in your own mind? A. I can recall no specific instance in telling him that, but I believe it was communicated.

Q. And you heard Mr. Brown's testimony that it was your idea to give the notes so that Mr. Noakes would have a sense of responsibility to meet payments and take care

of the obligation of Mr. Brown; was that correct? A. Yes, sir.

56 Q. Was his testimony in that regard correct? A. Yes, sir.

* * * * *

Mr. Saidman: At this time I will move for a directed verdict. Assuming everything that was testified to
57 by Mr. White were true, there is still no release to Mr. White. There is no consideration for any release to Mr. White.

The Court: All right. Counsel does not have to answer at this time, but the Court will give you overnight. The Court would request that any instructions that you desire would be in writing.

Frankly, it is difficult for the Court to see how this case can go to the jury, unless you have some law that will support it. As the Court understands it, Mr. White testifies that he was a partner, that he did enter into the obligation, that he left the partnership, that the plaintiff in this case has not been paid, and that he at no time ever had any agreement or understanding with the plaintiff in this case to be released.

Mr. Bakke: I think that is true.

The Court: I want to know on what theory it can go to the jury and you have until 9:30 tomorrow morning in my chambers, so that we will be ready for the jury at 10.

Mr. Bakke: All right, sir.

* * * * *

59 The Court: Mr. Bakke, at the end of yesterday's session, the Court recalls the motion was made by the plaintiff's counsel and the Court at this time affords counsel for the defendant an opportunity to answer that motion.

Mr. Bakke: That was the motion for a directed verdict, Your Honor?

The Court: Yes.

Mr. Bakke: Your Honor, my understanding of the conditions under which a directed verdict should be awarded is that the Court be convinced from the evidence adduced at the trial that there is no factual issue to be submitted to the jury and that, as a matter of law, the moving party is entitled to a judgment.

Now, proceeding on the basis of that understanding, it is my position that there are factual questions involved which are essential to the disposition of this case and, therefore, that these factual questions should be submitted to the jury.

Specifically, our defense is predicated upon the existence of a suretyship which arose at the time of the dissolution of the partnership by virtue of the remaining partners' agreement to assume existing partnership obligations and to hold the retiring partner, John Jamieson White, harmless.

Now, this agreement gave rise to a suretyship
60 wherein the remaining partners became principal on the existing obligations and the retiring partner, John Jamieson White, became a surety thereon. This, of course, does not in and of itself affect the pre-existing relationship of creditors. However, it is our position that, as a matter of law, where creditors are given notice of the existence of this agreement between the remaining partners and the retiring partner which gives rise to a suretyship relationship, that the creditors thereafter must, at their peril, deal with the principal in a manner consistent with the applicable law of suretyship and that any conduct on their part inconsistent with the obligations of the creditor toward the surety will discharge the retiring partner in his suretyship capacity.

Among the things which have that effect are granting of an extension of time for payment by the principal or the acceptance of negotiable notes in evidence of a debt.

Now, it is our position that there are really two factual questions involved with respect to this matter of surety-

ship: First of all, did the plaintiff, who was a creditor of the partnership at the time of its dissolution, have notice of the fact that the remaining partners had agreed to assume the partnership obligations; and secondly, the question of fact, did the plaintiff grant extensions of time to the principal? In our view, the disposition of these factual questions is dispositive of the defendant's liability insofar as the defense of suretyship is concerned.

61 Now, an alternative defense is that of waiver. Waiver, of course, is the voluntary relinquishment of a known right. It is our position that at the time or shortly after the withdrawal of John Jamieson White from the partnership, the plaintiff William A. Brown was put on notice, in a conversation with Mr. White, of the fact that the remaining partners had agreed to assume the partnership debts and that thereafter, after having received this notice, knowledge of this relationship between the remaining partners and the retiring partner, Mr. Brown billed the remaining partners only, for a \$22,000 debt which existed at the time of Mr. White's withdrawal. He consistently sent bills for this \$22,000 only to the remaining partners. This \$22,000 constituted the vast majority of the unpaid account of the plaintiff with the firm of Noakes and Neubauer, the remaining partners, and at a later date, when the account had been unpaid for sometime, certain promissory notes were executed by Noakes and Neubauer, the remaining partners, which were accepted by Mr. Brown.

At no time was there any discussion about Mr. White's liability for the \$22,000 debt. At no time during the course of the discussions or negotiations leading up to the signing of the promissory notes, was there ever any discussion about bringing Mr. White into the picture as a signatory to the promissory notes.

62 It is our position that this conduct inferentially could be construed as a consistent course of conduct on the part of the plaintiff consistent with an intention to

relinquish whatever claim he may have had against the defendant John Jamieson White and look only to the remaining partners, Noakes and Neubauer, at the very least for the \$22,000 bill. And the defendant himself stated that he took the notes from Noakes and Neubauer without bringing—

The Court: The plaintiff himself.

Mr. Bakke: —the plaintiff himself stated that he accepted the notes from Noakes and Neubauer without requiring Mr. White to sign them, because Noakes and Neubauer had promised to pay the debt and he didn't care who paid it, Mr. White had just set up a new business and didn't seem able to pay. This statement, in and of itself, appears to me to be consistent with an intention on the part of the plaintiff to look only to Noakes and Neubauer, the remaining partners.

Therefore, I feel that there is, at the very least, a factual question to be resolved in this regard, namely, did the plaintiff's course of conduct manifest an intention to look only to Noakes and Neubauer and to release John Jamieson White? If so, it is our contention that this constitutes a waiver of his right to proceed against John Jamieson White.

Therefore, Your Honor, I respectfully submit that there are two theories upon which defendant predicates
63 his defense, both of which involve factual issues which properly should be submitted to the jury and I respectfully request that plaintiff's motion for a directed verdict be overruled.

* * * * *

65 The Court: Mr. Bakke, on behalf of the defendant and recognizing your contention, as the Court understands your contention, that subsequent to the dissolution of the partnership and presuming knowledge on the part of the creditor, the Court then understands you to say that the partner White is placed in the position of a surety and that any conduct or course of conduct by the creditor

from that point on, which is detrimental to the position of the defendant, is a question of fact. Now, on the evidence that is presented in this case, what contention does the defendant make that the course of conduct or the conduct of the creditor is detrimental to the defendant, because

66 the Court understands from the testimony that the obligation was owed during the entire time and all parties recognized that the obligation was owed and was not paid. The Court understands that the defendant takes the position that he has been lulled into some detriment by the conduct of the creditor with relationship to the remaining two partners.

Mr. Bakke: Your Honor, on that point, I believe that the question of detriment would be material, were we arguing estoppel. We are not arguing estoppel, however; we are arguing waiver and we are merely saying that the course of conduct of the plaintiff subsequent to his becoming aware of the dissolution and the fact that Noakes and Neubauer had agreed to assume partnership obligations, is consistent with the manifestation of intent to look only to Noakes and Neubauer and not to the defendant John Jamieson White. This course of conduct then constituted a waiver, the relinquishment of a known right, namely, his right to proceed against John Jamieson White.

The Court: Then you claim no detriment?

Mr. Bakke: No, sir.

The Court: All right.

Mr. Bakke: With respect to the other point, Your Honor, the question of the suretyship relationship, again I don't believe it is necessary that there be a detriment. It is sufficient, in my view, that there be an action which is inconsistent with the law of suretyship, and I believe

67 it to be well settled that an extension of time for payment to the principals is such an action.

The Court: All right. Gentlemen, what is the definite amount? Do you stipulate on that?

Mr. Bakke: \$20,659.27.

Mr. Saidman: I suggest, in order that the record might be consistent with the judgment in the other cases, the amount is \$21,661.45, interest from August 30, 1957, less the credit, \$1,002.18. Then all three judgments would be the same and I submit to the Court, I believe the Court is familiar with the right of the creditor, to whom there is owed a liquidated amount, to demand interest, and the date that we have chosen is long after the debt became due.

The Court: All right. The motion of the plaintiff will be granted. The jury will be directed to bring in a verdict for the plaintiff. The amount will be in the amount of, what figure again? \$20,659.57?

Mr. Bakke: Twenty-seven, Your Honor.

The Court: Twenty-seven.

Mr. Saidman: Before the jury comes in, the interest item is also involved and I believe Your Honor has no discretion as to interest when the liquidated amount is due and overdue. There are cases in the Supreme Court of the United States and a case just handed down recently that interest is due from the date the liquidated debt
68 should have been paid. I believe we have had discussions on that, but a recent case just handed down January 7, 1960, says interest should be awarded from the date the obligation became due—in so many words—and we remand the case to the District Court with directions to determine when the obligation fell due and to award the interest from that time. That is *Rosden v. Luthold*.

The Court: August, what date?

Mr. Saidman: This case?

The Court: August?

Mr. Saidman: Mr. Brown testified that the debt should have been paid and was due long before, but we are claiming interest from August 30, 1957, which is after the debt became due.

(The jury resumed their places in the jury box.)

The Court: Ladies and gentlemen of the jury, the Court in this case directs you to bring in a verdict for the plaintiff.

Deputy Clerk: Will the jurors please stand.

Members of the jury, by direction of the Court, your verdict in this case is that you find for the plaintiff William A. Brown against the defendant John Jamieson White, in the amount of \$20,659.27, plus interest from the date of August 30, 1957, and that is your verdict so say you each and all.

(The jury signified affirmatively.)

The Court: All right, the ladies and gentlemen can be excused.

* * * * *

EXHIBITS

Plaintiff's Exhibit 1

(Printed *supra*, pp. 12, 13)

Defendant's Exhibit 1

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

June 6, 1957

Noakes & Neubauer
1145 - 19th Street, N. W.
Washington, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

Nacional de Ninos Hospital..... \$22,015.00

Defendant's Exhibit 2

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

August 3, 1957

Noakes & Neubauer
1145 - 19th Street, N. W.
Washington 6, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

Nacional de Ninos
Bill rendered June 6, 1957..... \$22,015.00

Defendant's Exhibit 3

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

October 1, 1957

Noakes & Neubauer
1145 - 19th Street, N. W.
Washington 6, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

National de Minos

Bill rendered June 6, 1957..... \$22,015.00

Defendant's Exhibit 4

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

June 1, 1957

White, Noakes and Neubauer
1145 - 19th Street, N. W.
Washington 6, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

Post Exchange and

Dispensary \$5,000.00

July 25, 1956—

Paid on account..... 2,000.00

Balance due \$3,000.00

Defendant's Exhibit 5

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

August 3, 1957

White, Noakes and Neubauer
1145 - 19th Street, N. W.
Washington 6, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

<i>Post Exchanges and</i>		
<i>Dispensary</i>	\$5,000.00	
July 25, 1956—		
Paid on account.....	2,000.00	
Balance due		\$3,000.00

Defendant's Exhibit 6

WILLIAM A. BROWN
CONSULTING ENGINEER
1223 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

October 2, 1957

White, Noakes and Neubauer
1145 - 19th Street, N. W.
Washington 6, D. C.

FOR PROFESSIONAL SERVICES RENDERED:

<i>Post Exchanges and</i>		
<i>Dispensary</i>	\$5,000.00	
July 25, 1956—		
Paid on Account..	\$2,000.00	
Sept. 27, 1957—		
Paid on Account..	2,969.43	4,969.43
Balance Due		\$30.57

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from the original

DEPENDANT'S EXHIBIT 18


 \$2000.00 Washington, D. C. September 28, 1957
 On November 1, 1957 AFTERDATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT The National Bank of Washington, Dupont Branch
 Washington, D. C.
 VALUE RECEIVED with interest at the rate of 6% per
 annum until paid.
 No. 1 Dec 11-1-1957
 Ronald J. Paulsen
 1145-1457

DEPENDANT'S EXHIBIT 17


 \$ 2000.00 Washington, D. C. September 28, 1957
 On December 2, 1957 AFTERDATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT The National Bank of Washington,
 Dupont Branch, Washington, D. C.
 VALUE RECEIVED with interest at the rate of 6% per
 annum until paid.
 No. 2 Dec
 Ronald J. Paulsen

DEPENDANT'S EXHIBIT 16


 \$ 2000.00 Washington, D. C. September 28, 1957
 On January 2, 1958 AFTERDATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT The National Bank of Washington,
 Dupont Branch, Washington, D. C.
 VALUE RECEIVED with interest at the rate of 6%
 per annum until paid.
 No. Dec
 Ronald J. Paulsen

DEFENDANT'S EXHIBIT 15

 \$ 2000.00 Washington, D. C. September 28, 19 57
 On February 3, 1958 AFTER DATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT The National Bank of Washington,
 Dupont Branch, Washington, D. C.
 VALUE RECEIVED, with interest at the rate of 6% per
 annum until paid.
 No 4 DUE Edward J. Neubauer

DEFENDANT'S EXHIBIT 14

 \$ 2000.00 Washington, D. C. September 28 19 57
 On March 3, 1958 AFTER DATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT The National Bank of Washington,
 Dupont Branch, Washington D. C.
 VALUE RECEIVED, with interest at the rate of 6% per
 annum until paid.
 No 5 DUE Edward J. Neubauer

DEFENDANT'S EXHIBIT 13

 \$2000.00 Washington, D. C. September 28, 19 57
 On April 1, 1958 AFTER DATE We PROMISE TO PAY
 TO THE ORDER OF William A. Brown
 Two thousand ----- DOLLARS
 PAYABLE AT National Bank of Washington, Dupont Branch
 Washington, D. C.
 VALUE RECEIVED, with interest at the rate of 6% per
 annum until paid.
 No 6 DUE Edward J. Neubauer

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DEFENDANT'S EXHIBIT 12

\$2000. Washington, D. C., September 28, 1957

On May 1, 1958 **AFTER DATE** We **PROMISE TO PAY**

TO THE ORDER OF William A. Brown

Two thousand-----**DOLLARS**

PAYABLE AT National Bank of Washington, Dupont Branch
Washington, D. C.

VALUE RECEIVED, with interest at the rate of 6% per annum until paid.

Donald J. [Signature]

No. **DCE**

DEFENDANT'S EXHIBIT 11

\$2000.00 Washington, D. C., September 28, 1957

On June 2, 1958 **AFTER DATE** We **PROMISE TO PAY**

TO THE ORDER OF William A. Brown

Two thousand-----**DOLLARS**

PAYABLE AT National Bank of Washington, Dupont Branch
Washington, D. C.

VALUE RECEIVED, with interest at the rate of 6% per annum until paid.

Donald J. [Signature]

No. **DCE**

DEFENDANT'S EXHIBIT 10

\$2000.00 Washington, D. C., September 28, 1957

On July 1, 1958 **AFTER DATE** We **PROMISE TO PAY**

TO THE ORDER OF William A. Brown

Two thousand-----**DOLLARS**

PAYABLE AT National Bank of Washington, Dupont Branch
Washington, D. C.

VALUE RECEIVED, with interest at the rate of 6% per annum until paid.

Donald J. [Signature]

No. **DCE**

DEFENDANT'S EXHIBIT 9

\$2000.00 Washington, D. C. September 28, 1957

On August 1, 1958 AFTERDATE We PROMISE TO PAY

TO THE ORDER OF William A. Brown

Two thousand-----DOLLARS

PAYABLE AT National Bank of Washington, Dupont Branch
Washington, D. C.

VALUE RECEIVED, with interest at the rate of 6% per
annum until paid.

NO 10 DUE *Small J. Neubauer*

DEFENDANT'S EXHIBIT 8

\$2000.00 Washington D. C. September 28 19 57

On September 1, 1958 AFTERDATE We PROMISE TO PAY

TO THE ORDER OF William A. Brown

Two thousand-----DOLLARS

PAYABLE AT The National Bank of Washington
Dupont Branch, Washington D. C.

VALUE RECEIVED, with interest at the rate of 6% per
annum until paid.

NO 11 DUE *Small J. Neubauer*

DEFENDANT'S EXHIBIT 7

\$1400.00 Washington, D. C. September 28 19 57

On October 1, 1958 AFTERDATE We PROMISE TO PAY

TO THE ORDER OF William A. Brown

Fourteen hundred-----DOLLARS

PAYABLE AT The National Bank of Washington,
Dupont Branch, Washington, D. C.

VALUE RECEIVED with interest at the rate of 6% per
annum until paid.

NO 12 DUE *Small J. Neubauer*

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BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 15,642

FILED AUG 3 0 1960

JOHN J. WHITE, JR., *Appellant,*

Joseph D. Stewart
CLERK

v.

WILLIAM A. BROWN, *Appellee.*

Appeal From a Judgment of the United States District Court for
the District of Columbia

EDWARD L. GENN
514 Colorado Bldg.
and
HARRY SAIDMAN
521 Colorado Bldg.,
Washington, D. C.
Attorneys for Appellee.

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee the questions presented on this appeal are:

FIRST: Should this Court adopt the rule of law that a retiring partner may become a mere "surety" for the existing debts of the partnership whenever the creditor has notice of an indemnity agreement between the parties, even though he is not a party to such agreement and has not *expressly* agreed to treat the retiring partner as a surety.

SECOND: Assuming arguendo that the District of Columbia will adopt such a rule, do the facts at bar most favorable to the appellant present a question for the jury on the issues of release of the retiring partner either on the theory that the creditor extended the time for payment of the debt or on the theory of "waiver," where no agreement for an extension of time for payment of release was expressly entered into or intended, nor any consideration given.

THIRD: Was it error for the trial Court to direct a verdict for the plaintiff-appellant in a suit for money due on account, where an undisputed amount was owed, where the defendant admitted to being a partner at the time the obligation was incurred, where the defendant left the partnership under an indemnity agreement from the continuing partners but without any express agreement of release from the creditor, and where more importantly, the retiring partner suffered no loss or detriment by the actions taken by the creditor in obtaining notes from the continuing partners.

INDEX AND TABLE OF AUTHORITIES

	Page
Statement of Questions Presented.	
Counterstatement of the Case	1
Summary of Argument	3
Argument	3
I. The Trial Court Properly Directed a Verdict for the Plaintiff for the Reason that the District of Columbia has Never Specifically Adopted the Rule Urged by Appellant that a Retiring Partner May Become a Surety for Debts of the Partnership in the Absence of an Express Agree- ment to do so, nor Should the District of Columbia Adopt Such a Rule at this Time	3
II. Even Assuming Arguendo that the Doctrine of Implied Equitable Suretyship Ought to be Ap- plied to Affect the Contractual Relationship Between a Creditor and a Retiring Partner, Nothing Occurred in the Instant Case to Raise a Factual Question as to Whether the Retiring Partner was "Discharged"	9
III. Appellant was not Released from the Obligation at Bar Under a Theory of Waiver	10
IV. Assuming Arguendo that the Plaintiff was Re- quired to Treat the Defendant as a "Surety", it is Proper to Direct a Verdict Against the Defendant where it is Conceded that He Suffered No Loss	11
Conclusion	13

AUTHORITIES

Chapman v. Hoage, 56 S. Ct. 333, 296 U.S. 526	12
Clark v. Gerstley, 26 App. D.C. 205	11, 12
Colegrove v. Talman, 67 N.Y. 95, 23 Am. Rep. 90	8
Dean v. Collins, 15 N.D. 535, 108 N.W. 242	6, 7, 8
Field v. Fishkin, 108 Wis. 149, 192 N.W. 463	7

	Page
Francis v. McNeal, 33 S. Ct. 701, 228 U.S. 695	5, 6
Freeman v. Moses, 52 App. D.C. 164, 285 Fed. 898	9
McCoy v. Jack, 47 W. Va. 201, 34 S.E. 901	7
Mearns v. Chatard, 47 App. D.C. 257	3, 9
Messner v. Masons Dairy, 4 P. 2d 207, 117 Cal. App. 486	9
Michelin Tire Co. v. Akers, (N.M.), 255 Pac. 388	10
Oakeley v. Pasheller, 10 Bligh N.S. 548, 6 Reprint 207, 4 Cl. & F. 207, 7 Reprint 80	7, 8
Presbrey v. Thomas, 1 App. D.C. 171	5, 6
Regester v. Dodge, 6 Fed. 6	10
Ridgeley v. Robertson, 67 Mo. A. 45	7
Shapleigh Hdwe. v. Wells, 90 Tex. 110	7
Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529	4, 8
Swire v. Redman, 1 Q.B.D. 536	7
Tuckerman v. Mearns, 49 App. D.C. 153, 262 Fed. 607	3, 10
Wadhams v. Page, 1 Wash. 420, 25 Pac. 462	10
Annotation, 9 L.R.A. (N.S.) 49	7
Annotation, 48 L.R.A. (N.S.) 547	7

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,642

JOHN J. WHITE, JR., *Appellant*,

v.

WILLIAM A. BROWN, *Appellee*.

Appeal From a Judgment of the United States District Court for
the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This case involves the granting of a Motion for a Directed Verdict. Thus it is plainly incumbent upon appellee to treat the facts most favorably to appellant. In this regard, for example, there is a dispute between plaintiff's and defendant's testimony as to whether the plaintiff had notice of the so-called dissolution agreement; however, for the purposes of the appeal, defendant's testimony that the plaintiff had such notice must be accepted as true.

The facts stated by appellant in his "Statement of the Case" are essentially correct with these additions:

(1) Appellant fails to state that the uncontradicted testimony of the plaintiff-appellee on direct and cross examination was that the notes involved were taken simply to make one of the continuing partners (Noakes) more sensitive to the obligation and to pay with some degree of regularity (J.A. 20), that defendant-appellant White was not asked to sign the notes because he didn't seem financially able to pay at the time (J.A. 21), that plaintiff did not grant the continuing partners any extension of time but simply tried unsuccessfully to collect the debt from them (J.A. 19), that the notes were not accepted in payment of the underlying obligation (J.A. 22), and that the plaintiff Brown never released the defendant White (J.A. 23).

The defendant himself specifically testified that he was never told that he was released, never discussed being released, nor did he even enter into any agreement for release with plaintiff Brown. (J.A. 31)

The defendant called the continuing partner, Neubauer, as his own witness. Neubauer testified that the sole purpose of the notes was to install fiscal responsibility and impress Noakes with the importance of the obligation (J.A. 33, 34, 35) and that there was no agreement or discussion relative to release of Mr. White (J.A. 33). He also testified that the plaintiff was not given notice of the dissolution of January 1 until April, 1957. (J.A. 32)

The appellant also fails to state that at the time Mr. White, the defendant, left the business to form his own concern, he received approximately \$10,000.00 from the partnership paid over a period of one year and a promise of 35% of the profits on the then-existing jobs. (J.A. 26). He received this money in spite of the fact that there was never sufficient money available to pay the plaintiff his debt (J.A. 33-4).

Finally, appellant fails to state that appellant-defendant suffered no loss or detriment whatsoever, that the theory of appellant and representation to the trial Court was that defendant White incurred no loss or injury at all by reason of the conduct of appellee Brown in obtaining the notes in question. (J.A. 39)

SUMMARY OF ARGUMENT

Appellee urges that the lower Court was correct in directing a verdict for the appellee, plaintiff Brown, because there was no factual issue for the jury to determine in this case: *Firstly*, on the ground that the sound rule of law requires an *express* agreement of release founded upon consideration to release a retiring partner and it was admitted at trial that no such agreement was made; *Secondly*, because even assuming appellant's theory of "suretyship" should apply, no factual issue was raised on the issue of discharge or release of the retiring partner, and, *Thirdly*, because the retiring partner showed no loss or detriment justifying release from liability either at law or in equity.

ARGUMENT

- I. THE TRIAL COURT PROPERLY DIRECTED A VERDICT FOR THE PLAINTIFF FOR THE REASON THAT THE DISTRICT OF COLUMBIA HAS NEVER SPECIFICALLY ADOPTED THE RULE URGED BY APPELLANT THAT A RETIRING PARTNER MAY BECOME A SURETY FOR DEBTS OF THE PARTNERSHIP IN THE ABSENCE OF AN EXPRESS AGREEMENT TO DO SO, NOR SHOULD THE DISTRICT OF COLUMBIA ADOPT SUCH A RULE AT THIS TIME.

Although no reference to the specific local law was made either at trial or in this Court by appellant, it would seem more appropriate that appellant's argument should first examine the law of the District of Columbia, rather than authorities elsewhere.

There is to be found in this jurisdiction a decision which touches upon most of the matters raised by this appellant. That decision is *Mearns v. Chatard*, 47 App. D. C. 257 (1918). Further, the case of *Tuckerman v. Mearns*, 49 App. D.C. 153, 262 Fed. 607 also pertains to some matters raised by appellant.

In *Mearns v. Chatard*, *supra*, the Court discussed the rule that a retiring partner could, under circumstances where he has an indemnity agreement from the continuing partners, become a "surety" for the past debts of the partnership in the absence of an express agreement. The Court also discussed what appellee suggests is plainly the better rule—that only *express* agreement entered into for valid consideration can release the retiring partner from past due obligations.

In fairness, it must be stated that *Mearns v. Chatard*, *supra*, merely states the two rules. It does not expressly adopt either. Thus, the question before this Court is precisely this: which rule should this Court follow?

The doctrine urged by the appellant is really suretyship-by-operation-of-law, or implied equitable suretyship. This doctrine can be called "implied suretyship," because it arises by operation of law and not by express agreement. It may also be referred to as "equitable suretyship" because it arises at a time *after* the formation of the contract between the debtor and creditor and seeks to protect the equities of the retiring partner. (See, for example, page 7 of Appellant's brief, citing *Smith v. Sheldon*, 35 Mich. 42, 48, 24 Am. Rep. 529 to this effect.)

Appellee will therefore refer to appellant's theory as the doctrine of *implied equitable suretyship*.

The second doctrine discussed by the case of *Mearns v. Chatard*, *supra*, requires the *express* agreement of the creditor, and consideration therefor, in order to effect the release of the retiring partner.

Since our local law has not adopted either principle specifically, the threshold issue may be restated in this manner: "Should this Court adopt the rule of what we have called implied equitable suretyship and apply it to the situation at bar, or, should it require an express agreement by the creditor and retiring partner founded upon adequate con-

sideration to effect a release of such partner from existing debts?"

To aid the Court in its determination, appellee suggests that it is important that certain basic guideline rules of partnership be first stated clearly. Whether or not this Court ought to adopt the principle of implied equitable suretyship in this case cannot be decided without reference to certain other fundamental principles of partnership law as they apply to the District of Columbia. Two basic rules, which may aid in this determination are these: (1) Each partner is *jointly* and *severally* liable for the ordinary debts of the partnership. See *Presbrey v. Thomas*, 1 App. D. C. 171. (2) Partnership debts are not merely debts of a "business" but they are individual debts of the members of the firm. See *Francis v. McNeal* 33 S. Ct. 701, 228 U.S. 695. In this regard the language of Justice Holmes in *Francis v. McNeal*, *supra*, states the matter clearly: "... partnership debts are debts of the members of the firm and ... the individual liability of the members is *not collateral*, like that of a surety, but *primary and direct* whatever priorities there may be in the marshalling of assets. ... Therefore, ordinarily, it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts. ... A judgment could be got and the partnership debt satisfied on execution out of the individual estates." 228 U.S. 695, 699, 700. (emphasis added)

With these principles in mind—indeed, fundamental principles to the contractual relationship between partner and creditor—would be sound to say, as does the appellant, that this Court should adopt the rule that whenever a retiring partner is ostensibly saved harmless by the continuing partners, he henceforth becomes a "surety," vis-a-vis all existing creditors?

It has been stated as fundamental to the law of the District of Columbia, that all partners are *jointly and severally*

liable for debts of the partners and that partnership debts are not merely collateral debts as in suretyship, but primary and direct individual debts of the individual members. See *Presbrey v. Thomas*, *supra*, and *Francis v. McNeal*, *supra*.

How then, in logic and reason, can it successfully be contended that a retiring partner who owes a debt *jointly and severally can thereafter unilaterally and without any control or approval by the creditor*, convert himself from a contractual debtor into a surety-by-operation-of-law? Why, without statutory or express contractual right, should a partner be able to transform himself from a contracting debtor to a mere surety, simply by notifying his creditor that he has received a save-harmless or indemnity agreement from the continuing partners?

No more adequate answer can be given to this question than that found in the leading case of *Dean v. Collins* 15 N.D. 535, 108 N. W. 242 9 L.R.A. (N.S.) 49. To employ the doctrine of implied equitable suretyship in partnership contracts is totally illogical, without reason, and destructive of fixed contractual relations. The creditor is not a party to the indemnity agreement. He has no say in it. He cannot alter it. He cannot effect it. He receives no benefits from it. Yet, he is expected to be bound by it in those jurisdictions which adopt this rule. The creditor thus loses a contractual debtor in spite of the fact that at the outset he could expect his contract would be respected and continued in effect in its entirety. He has a right to rely upon the rule that the liability of each partner is joint and several, and the further rule that the debts of the partnership are the debts of each member.

Appellee does not wish to suggest or imply that his position is the only rule. The doctrine of *Dean v. Collins*, *supra*, is not the sole decision in the matter. It is, however, the sound rule. The decisions in the various jurisdictions are sharply split. Indeed, it is fair to say that for every case cited by appellant on his brief, there are directly opposing

citations elsewhere. See e.g. *McCoy v. Jack* 47 W. Va. 201, 34 S.E. 901; *Field v. Fishkin*, 180 Wisc. 149, 192 N.W. 463; *Ridgely v. Robertson* 67 Mo. A. 45; *Shapleigh Hdwe. v. Wells*, 90 Tex. 110, 37 S.W. 411.

Since much of what appears in appellant's brief can be found in an exhaustive annotation it would be entirely superfluous for appellee to clutter this brief with profuse contrary citations which are to be found in this annotation and its supplement. See 9 L.R.A. (N.S.) 49. 48 L.R.A. (N.S.) 547.

The suggestions which this appellee has made thus far have been directed to the wisdom and logic of the rule of implied equitable suretyship.

It is not, however, inappropriate to suggest that the rule itself was conceived in misinterpretation.

The original decision which adopted the rule urged by appellant appears to be *Oakeley v. Pasheller*, 10 Bligh, N.S. 548, 6 Reprint 207, 4 Cl. & F. 207, 7 Reprint 80. This is an old English case. The later English case of *Swire v. Redman*, 1 Q.B.D. 536, pointed out that in *Oakeley v. Pasheller*, the creditors upon valid consideration expressly consented to hold the retiring partner only secondarily liable. Subsequently, after many of the American decisions had already adopted what they thought to be the rule of *Oakeley v. Pasheller*, *supra*, that is, that a "surety" relationship could be created absent an express agreement, it then became apparent that the doctrine was based upon complete misinterpretation of the *Oakeley* decision. See *Dean v. Collins*, *supra*.

It is submitted that neither logic nor reason can justify the application of the rule of implied equitable suretyship to the facts at bar. It is further submitted that this Court should not adopt a rule conceived, as this rule was, under such doubtful circumstances.

But this is not all. It is obvious that the jurisdictions which have persisted in retaining this rule have done so out of equitable considerations. For example, the New York Courts appeared to have adopted the rule as the result of the case of *Colegrove v. Talman* 67 N. Y. 95, 23 Am. Rep. 90, cited in Appellant's brief at pages 6 and 9. *Colegrove v. Talman*, *supra*, was an equity suit in which the retiring partner contended that his rights were severely prejudiced by the creditor's delay in enforcement or attempts to enforce an obligation as to the continuing partners. The Court called upon what is thought to be the rule of *Oakeley v. Pasheller*, *supra*, to protect and preserve the *equities* of the retiring partner, and ruled that under the circumstances of the case there was a discharge of the retiring partner because of the action of the creditor, even in the absence of consideration or an express agreement. The decision upon which the Michigan cases rely, *Smith v. Sheldon*, 35 Mich. 42 24 Am. Rep. 529, cited in detail in appellant's brief at page 7, is similarly a case arising out of an alleged prejudice or inequity to the retiring partner because of the action of the creditor.

Thus, it would seem clear that whatever merit may exist in this proposed doctrine, might be found in its attempt to relieve the retiring partner of his debt only where substantial *prejudice* has fallen upon him because of the creditor's conduct since his retirement.

Appellee urges that this is not a sound reason for adopting such a rule, simply because it is important that fixed contractual relationships shall not be *unilaterally* and *without express consent* altered or modified. See *Dean v. Collins*, *supra*.

However, if the doctrine is to have some existence and effect in the District of Columbia, such should be the case only where a manifest injustice has been done to the retiring partner by the creditor. The defendant at bar suffered no loss and establishes no equitable position (J.A. 39). His

entire theory was pitched to the admission that he incurred no detriment whatsoever. (J.A. 39)

The Trial Court evidently considered such an admission to be a significant factor in the case and granted the Motion for Directed Verdict at least in part because of the lack of prejudice on the rights of the retiring partner (J.A. 38-39.). It is submitted that this position is plainly sound, as will be more fully explored in a subsequent portion of this brief.

II. EVEN ASSUMING ARGUENDO THAT THE DOCTRINE OF IMPLIED EQUITABLE SURETYSHIP OUGHT TO BE APPLIED TO AFFECT THE CONTRACTUAL RELATIONSHIP BETWEEN A CREDITOR AND A RETIRING PARTNER, NOTHING OCCURRED IN THE INSTANT CASE TO RAISE A FACTUAL QUESTION AS TO WHETHER THE RETIRING PARTNER WAS "DISCHARGED."

This portion of appellee's brief, as well as those that follow, will assume arguendo the application of the theory urged by appellant.

Would this alter the validity of the decision of the trial Court?

Appellee suggests that it would not.

In *Mearns v. Chatard*, *supra*, it is pointed out that the appellant there conceded there was *no agreement* for the extension of time such as would preclude a suit for the money by Mrs. Chatard (47 App. 257, 264). The appellant in that case made a concession which applies to the appellant at bar. Where is there at bar an *agreement* for the extension of time for payment? Where is there any *consideration* given Brown for an extension of time?

The general rule has been that in cases involving retiring partners, there is a *presumption* that a note is not given as payment but merely as collateral security for the original debt. See *Messner & Mason's Dairy* 4 P.2d 207, 117 Cal. App. 486. In the District of Columbia it is clear that the there acceptance of a note by the creditor does not discharge the debt on open account unless a *special express* agreement to this effect is made. See *Freeman v. Moses*, 52 App. D. C. 164, 285 Fed 898.

The uncontradicted evidence before the Court was that the appellant received no benefit and entered into no express agreement which, in the language referred to in *Mearns v. Chatard*, absolutely tied his hands.

Thus, with no evidence showing an agreement to extend the time for payment and with no evidence of *consideration* for such an agreement, nor any evidence that the notes involved were taken in payment of the account, and with the presumption of law to the contrary, the Court properly directed a verdict even on the appellant's theory of the case.

III. APPELLANT WAS NOT RELEASED FROM THE OBLIGATION AT BAR UNDER A THEORY OF WAIVER.

Appellant suggests that under certain decisions, particularly *Regester v. Dodge* (1881), 6 Fed. 6, the creditor may be said to have impliedly released the retiring partner. Appellant points to the fact the creditor continued to deal with the remaining partners. However, in the District of Columbia, it is clear that by continuing to deal with the remaining partners, a creditor does not release the retiring partner. See *Tuckerman v. Mearns*, 49 App. D.C. 153, 157, 262 Fed. 607. On this issue see also, *Wadhams v. Page* 1 Wash. 420, 25 Pac. 462 and *Michelin Tire Co. v. Akers* (N.M.) 255 Pac. 388.

Regester v. Dodge, supra, is plainly a decision resting upon limited equitable principles.

At bar, no consideration was realized by appellee for the alleged "waiver." Carefully read, it is clear that *Regester v. Dodge* rests upon principles of *estoppel* not waiver. It is the prejudicial conduct of the creditor which defeats his rights there. Yet at bar, we have no detriment, no loss, no equity resting in appellant. (J.A. 39)

Mr. White himself admits he was starting a new business, yet he urges in his brief that plaintiff-appellee's delay in filing suit or pressing for payment is somehow evidence of a release as to him. For what consideration? Where is his loss, his detriment?

It would, indeed, be novel if a creditor who chose to forebear on his debtor is *deemed* to release him. When does this "waiver" take place?

A statute of limitations might bind the creditor and prevent recovery when pleaded. So too, laches might defeat the creditor in an equity case, where there has been *prejudice*.

How can it be logically argued, however, that something short of the statute of limitations or laches defeats a debtor who is jointly and severally liable for a given debt. Appellant has not cited sound authority for this view. Appellee submits there is no such authority.

IV. ASSUMING ARGUENDO THAT THE PLAINTIFF WAS REQUIRED TO TREAT THE DEFENDANT AS A "SURETY", IT IS PROPER TO DIRECT A VERDICT AGAINST THE DEFENDANT WHERE IT IS CONCEDED THAT HE SUFFERED NO LOSS.

The appellant cites the case of *Clark v. Gerstley*, 26 App. D.C. 205 as authority for the proposition that an extension of time for payment discharges the surety.

It must be remembered, of course, that *Clark v. Gerstley*, *supra*, is a case of *express* suretyship. If it adopts the appellant's theory—which appellee contends it should not—this Court should consider the principles of *express* suretyship as applicable to retiring partners, *only where those principles will effectuate the purposes of partnership liability*.

It is quite true that when *Oakeley v. Pasheller*, *supra*, and the American decisions adopting it first arose, there was well established in the law of *express suretyship* the principle that a surety was discharged by an extension of time for payment. It is clear that the reason for the rule was that express suretyship contracts were to be strictly construed and the equities of the surety protected. However, as time passed, this doctrine became antiquated and unfair because it did not consider whether or not the surety actually suffered a loss.

Consequently, the District of Columbia ultimately adopted the rule that a compensated surety is discharged by

an extension of time for payment *only to the extent that he has been prejudiced*. *Chapman v. Hoage* 56 S. Ct. 333, 296 U.S. 526 (1936) reversing 64 App. D.C. 349, 78 Fed. 233.

These principles, that of *Clark v. Gerstley*, *supra*, and *Chapman v. Hoage*, are those of *express* suretyship.

How can a rule of *implied* equitable suretyship imported into partnership law logically give greater rights to the retiring partner than a surety obtains by express agreement under suretyship law?

Clearly, in this case, if either rule is to be followed, that of *Chapman v. Hoage*, *supra*, is preferable. Appellant White's position is certainly *not* analogous to that of an accommodation surety. He received concrete benefits from the creditor, both while a member of the partnership and upon retiring. If any principle of express suretyship is to be imported into this case, it ought to be that principle which treats the retiring partner as a compensated surety—as one required to show a prejudice and detriment in order to effect a discharge.

The irony of the facts at bar is this: White admits and concedes that he has suffered no loss or detriment due to Brown's acceptance of the notes (J.A. 39); he further admits that he (White) received \$10,000 after he left the partnership, although it is plain that equity would surely demand that the plaintiff Brown as a creditor should have been paid this sum in preference to White. Yet because Brown took certain notes from the remaining partners, White is allegedly discharged from debt irrespective of their relative equities.

It has always been the maxim of equity that he who invokes an equitable doctrine must do equity. How can the receipt of \$10,000.00 by White under the circumstances of this case justify *equitable* suretyship.

It has also been the rule that he who seeks equitable rights must suffer a wrong requiring the intervention of equity.

Why should the debt of the appellant be discharged on the basis of the creditor's action when it is admitted and conceded that White suffered no loss or detriment because of those actions?

Appellant has not answered these questions, nor can he supply a satisfactory reply to them.

One further point in this regard should be made. It is White, the appellant, who entered into the purported indemnity agreement. For whatever liability falls upon him, he can always claim rights against the continuing partners which he has so far sought to avoid as to appellee.

Considering all the circumstances, and more particularly all the equities of this case, here is where the matter should rest; the appellee should have judgment against appellant and the appellant may assert his rights against the continuing partners under his indemnity agreement with them.

CONCLUSION

The theory urged by appellant is illogical and without reason.

What is more, it is inequitable—both in principle and in application to this case.

For these reasons, and for the reasons heretofore urged, it is submitted that the trial Court properly granted appellant's motion for a directed verdict.

Respectfully submitted,

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PETITION FOR REHEARING OR MODIFICATION OF
OPINION BY DIVISION OF THIS COURT OR IN THE
ALTERNATIVE PETITION FOR REHEARING EN BANC

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 15,642
—

JOHN J. WHITE, JR., *Appellant*,

v.

WILLIAM A. BROWN, *Appellee*

—

**Appeal From a Judgment of the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

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TABLE OF CASES

	Page
Cafeteria & Restaurant Workers v. McElroy, No. 14689, Decided April 14, 1960	12
Dean v. Collins, 15 N.D. 535, 108 N.W. 242, 9 L.R.A. (N.S.) 49	10
Dunbar v. Steiert, 31 Ariz. 403, 254 P. 1113 (1937) ..	6, 7
Exchange Lumber v. Thomas, 233 P. 2d 406, 71 Idaho 391 (1950)	5
Garthofner v. Edmunds, 166 P. 24, 60, 61, 167 P. 2nd. 789, 791, 74 Cal. App. 2nd. 15	5
House v. Parker, 193 S.E. 617, 56 Ga. App. 674	5
International Harvester v. Layton, 148 Ark. 156, 229, S.W. 22 (1931)	6, 7
Joseph Melnick Building and Loan v. Melnick, 64 A. 2d 773, 777, 361 Pa. 328	5
Le Gault v. Lewis-Zimmerman, 28 Wyo. 474, 206 P. 157 (1922)	7, 8
Littshire Clothes v. Detroit Hub Clothes, 294 N.W. 69, 294 Mich. 661	5
Oakley v. Pascheller, 4 Clark & F. 207, 7 Eng. Reprint 80, 19 Bligh N.S. 548, 6 Eng. Reprint 202	9
Regester v. Dodge, 6 Fed. 6 (1881)	2, 3, 4, 5, 7, 8
Scott v. Wyoming Oils, 75 P. 2d, 764, 771, 52 Wyo. 433	5
Swire v. Redman, 1 Q.B.D. 536	9
Tolland v. Lista, 143 A. 2d. 601, 46 N.J. Super 272	5

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal From a Judgment of the United States District Court
for the District of Columbia

PETITION FOR REHEARING OR MODIFICATION OF
OPINION BY DIVISION OF THIS COURT OR IN THE
ALTERNATIVE PETITION FOR REHEARING EN BANC

- I. The Division of This Court Which Heard This Appeal Should Grant Appellee's Petition for Rehearing or Modification of Opinion on the Ground, Firstly, That as to the Issues of Waiver or Release of the Appellant-Retiring-Partner, the Authorities Cited by the Court's Majority Opinion on This Novel Question Were, With the Exception of One Case Which Is Plainly Inapplicable to the Facts at Bar, Neither Cited Nor Presented at Argument

by Appellant, Thereby Precluding Appellee's Attempt to Distinguish Them; Secondly, on the Ground That the Court's Majority Relied Upon Cases Which Purportedly Supported a Doctrine of "Waiver" When in Fact They Involved a Novation, the Consideration for Which Was the Addition of a New Partner Never Before Liable; Thirdly, That Since No New Partner Was Substituted for Appellant at Bar and Since Each Remaining Partner Herein Was Liable After Appellant's Retirement to the Same Extent as Before the Retirement, There Was No Novation Under Well Established Principles, and Thus, the Court's Reliance Upon the Authorities Stated in the Majority's Opinion Is Misplaced, and Should be Reconsidered in Light of the Additional Authorities and Argument.

As the Court will recall, the instant opinion rules in part that a partner may be relieved of liability for a debt for which he was *already* liable as an active partner if, after his retirement, there is a "waiver" by the creditors. The cases cited by the Majority should be reconsidered because they do not support the Court's Opinion for reasons hereafter discussed.

The only case authority cited or argued by Appellant in his brief or argument, and relied upon by the Majority in its Opinion, to support a doctrine of "waiver" is the case of *Regester v. Dodge*, 6 Fed. 6 (1881).

There are plain and obvious reasons why *Regester v. Dodge*, the primary authority of the Majority Opinion, does not apply to the facts at bar, and those reasons may be compactly arranged and reduced to this statement: *Regester v. Dodge* does not apply to this case and is not authority upon which to base it because it involves the addition of two new partners, *not formerly liable*, who are treated as debtors substituted for the retiring partners; because the *addition* of these new partners after the retirement of the two previous partners, and their acceptance by the creditor, created a new contract called a *novation* (a legal term never used by the Majority Opinion and never

alluded to or urged in Appellant's brief); and because since the cases required substitution of *new parties, never previously liable*, as the basis for *novation* in circumstances such as those at bar, the case of *Regester v. Dodge* is no authority whatsoever for the instant case.

Does *Regester v. Dodge* actually involve the bringing in of new members to the firm after retirement of two of the partners? Does it really involve an issue of *novation*?

The Court, in *Regester v. Dodge*, pointed out the material facts in this regard rather clearly at Page 8 of that opinion (6 Fed. 6, 8): At the time the creditor, Regester, gave money to the firm of Jay Cooke and Company, it was composed of one William Moorehead, Henry Cooke, Pitt Cooke, George Thomas, Harry Fahnestock, John Sexton and Edward Dodge. The firm was dissolved on January 1, 1871. John Sexton and Edward Dodge retired. A new firm was formed consisting of both the remaining partners *and two new members*, Jay Cooke, Jr. and James Carhart (6 Fed. 6, 8). It was this new firm with which the creditor dealt. It is the *addition* of these *new* partners, who had no connection with the firm previously, which raises the issue of *novation* and brings about consideration.

To show that the issue of *novation* was involved in *Regester v. Dodge*, one need go no further than this question put by the Court in that case: "What, then, are the circumstances in this case tending to show an assent by the plaintiff to the *novation* of the debt sued on?" (6 Fed. 6, 10, emphasis added) The Court answers its question of *novation* by stating this: Regester, the creditor, knew of the dissolution, knew that Dodge and Sexton had retired and further knew that "*a new firm had been formed containing members who were not members of the old firm*", and he dealt with this new partnership knowing of its assumption of the liabilities of the retired partners (6 Fed. 6, 10, emphasis added).

What more clear proof that a novation was involved in *Regester v. Dodge* and that the retiring partners Dodge and Sexton were substituted as debtors by the *new* partners Jay Cooke, Jr. and James Carhart than to refer to these precise words from the case itself?

What difference does this make to the Majority Opinion? Simply this: *Regester v. Dodge* appears to be the fundamental basis for the Majority's Opinion on the doctrine of "waiver". That case, however, did not involve a waiver but involved a *novation*. There was no novation in the case at bar. Indeed appellant White never argued a novation theory. When John White left the firm and obtained an assumption agreement from Noakes and Neubauer, the remaining partners, he was not substituted for by some third person, as occurred in *Register v. Dodge*.

The authorities state that in such circumstances as this case, a new debtor *not* previously liable or a new debt must be introduced in order to create consideration for the discharge of those previously liable by an act of novation; or more simply stated, to create the kind of situation which was found in *Regester v. Dodge*, there had to be brought into being new partners, a novation.

The appellant hereinafter considers and discusses those authorities, and further seeks to show why the additional cases, those not considered either in the briefs or arguments of Appellant, similarly do not support the Majority's Opinion.¹

It is clear that the Courts have held that there cannot be a novation, under circumstances of this case, unless there

¹ Of course, of real significance in *Regester v. Dodge* is the further point made in Appellee's brief and the dissenting opinion at bar by Judge Washington, namely, that *Regester v. Dodge* also rested upon unusual equitable considerations (bankruptcy, prejudice and delay) not found at bar. Even as authority for the principle of "novation," its weight is impaired in that it is an opinion by a District Court Judge, has not apparently been cited for over twenty-five years until relied upon by the Majority, and its "slight circumstances" rule has been criticized and disapproved. See Majority's Opinion, Page 4.

is included in the action a *third party who neither owed a previous duty nor was entitled to its performance*. Such is the holding of *Scott v. Wyoming Oils*, 75 P. 2d. 764, 771, 52 Wyo. 433. Similarly, in the case of *Joseph Melnick Building and Loan v. Melnick*, 64 A. 2d. 773, 777 361 Pa. 328, the same rule is stated, namely, that a novation includes a third party, one who neither owed the previous duty nor was entitled to its performance. To the same effect see *Tolland v. Lista*, 134 A. 2d. 601, 46 N. J. Super. 272. See *Restatement of Contracts* c. 13 sec. 424 Part c.

In addition, the case of *Exchange Lumber v. Thomas*, 233 P. 2d. 406, 71 Idaho 391 (1950), is similar on the question of whether or not there is a novation where there is a *subtraction* of a partner rather than the addition of one. In that case the Court held that the promise of one of the original partners who agreed to pay the debt cannot bring about a novation and discharge because the continuing partner was already liable on the account, and her promise to pay the debt would be no more than a promise to do that which she was already bound to do; thus it was not consideration for the discharge of the other partners and does not constitute a novation.

See also in this regard *Garthofner v. Edmunds*, 166 P. 2d. 60, 61, 167 P. 2d. 789, 791, 74 Cal. App. 2d. 15; *House v. Parker*, 193 S.E. 617, 56 Ga. App. 674; Compare *Littshire Clothes v. Detroit Hub Clothes*, 294 N.W. 69, 294 Mich. 661, for a clear example of a substitution of new debtors who were not formerly liable.

This is not all.

In addition to *Regester v. Dodge*, the Majority Opinion also cited certain other cases in support of its position of "waiver." An analysis of these cases follows because they were not previously argued or briefed by Appellant and the question decided is novel. This analysis should indicate that they are not support for the position of the Court's Majority.

Dunbar v. Steiert, 31 Ariz. 403, 253 P. 1113 (1937) cited at Page 4 of the Majority Opinion, is a clear case of novation by the substitution of a new debtor. The case dealt with the effect of the substitution of A. R. Miller for the liability of Steiert, the retiring partner. The Court stated at page 1114, "The essence of the new contract was the substitution for appellee as debtor." As the dissenting opinion herein points out, such is not the case at Bar. Since *Dunbar v. Steiert* is a novation decision, involving the introduction of a *new* debtor never before liable, it is not support for the Majority's Opinion.

In *International Harvester Co. v. Layton*, 148 Ark. 156, 229 S. W. 22 (1931), cited by the Majority Opinion at page 4, the appellate court there was concerned with whether or not there was substantial evidence in the case to support the decision below which found for the retiring partner, Layton. It was Layton's testimony that the account sued on was created *after* the dissolution of the partnership. The testimony showed that the deliveries by the creditor, and hence the debt on the open account, arose *after* Layton's retirement. The Lower Court found for Layton, the retired partner, thus sustaining this claim. Wholly apart from the point suggested by Judge Washington in the Dissenting Opinion at Bar (page 12, Footnote 2) noting an express waiver in this case, it is also clear that the issue involved in *International Harvester v. Layton* dealt with the liability of a retiring partner for debts incurred *after* the dissolution of the partnership. This, of course, is a wholly separate and distinct issue, not involved and not in dispute in the instant case. The issue before this Court is whether or not the appellee^{NT} herein is discharged of a *pre-existing* liability, or for a debt for which he was *already* liable, or for one which arose during his active partnership, and not for debts subsequently incurred *after* his retirement. Since the general finding below in the *Layton* case sustained the retired partner's position that the debt involved occurred *after* dissolution,

it can be no support for the majority Opinion's doctrine of "waiver."

The Majority also cited the case of *Le Gault v. Lewis-Zimmerman*, 28 Wyo. 474, 206 P. 157 (1922). This case is similarly no authority for the "waiver" proposition cited. It involved the relationship between the partners themselves, and the question was whether there was a partnership in existence and what was its extent. In order to show this, the Court permitted in evidence of dealings between a creditor and the continuing partner, not to show a "waiver" or release or discharge, but to show the existence of a partnership relation between the partners themselves. On its face, *Le Gault v. Lewis-Zimmerman* is not authority for the Court's proposition.

Appellant has devoted some attention to the analysis of these last cases because they had not been briefed or argued previously and because the principle enunciated by the Majority is a one of first impression.

In summary, *Regester v. Dodge*, involves the *substitution of two new partners* for the two retiring partners; it involves a new relationship, a new contract, a novation by persons not already obligated to the creditor, and their agreement to assume the obligations of the retiring partners. Since, as the Majority appears to have placed reliance upon *Regester v. Dodge* unjustifiably, it should rehear this case.

The remaining cases cited by the Majority to support a doctrine of "waiver" do not supply the element that *Regester v. Dodge* lacks. Reconsideration should be given to them, as well as to *Regester v. Dodge*, in the light of the authorities cited in this petition. They involved either a novation (*Dunbar v. Steiert, supra*), the question of liability of a retiring partner for obligations incurred after his retirement (*International Harvester v. Layton, supra*) or the relationship of the partners between them-

selves (*Le Gault v. Lewis Zimmerman, supra*). None of these decisions, nor *Regester v. Dodge* can therefore serve to justify the "waiver" doctrine in the Majority's Opinion. There simply is no such established doctrine in the law.

It is further suggested that the analysis of the Dissenting Opinion by Judge Washington is sound, and that the Court should reconsider its position and either rehear the "waiver" issue or modify the Majority Opinion accordingly.

II. The Division of This Court Which Heard the Appeal Should Grant Appellee's Petition for a Rehearing or Modification of Opinion. Firstly, Because the Majority Should Not Have Adopted the Rule That a Retiring Partner May Become a Surety for the Existing Debts of the Partnership Since This Doctrine Arose Out of a Misunderstanding and a Misinterpretation of the English Law and Is Unsound. Secondly, Because the Majority Did Not Rule Upon the Issue of Whether the Taking of the Notes in Question Constituted Consideration, Even Under the Adopted Rule. Thirdly, Because After Requiring the Appellant to Show Detriment and Prejudice of the Retiring Partner Under the Theory of "Suretyship", the Majority Stated That There Was No Stipulation at Bar for Lack of Prejudice as to This Issue, in Spite of the Fact That Appellant Himself Never Took This Position, Never Denied the Stipulation, Never Asked to be Relieved of His Statement to Trial Court, Either in His Brief or Argument in This Court, But Instead, Always Asserted to the Trial Court and This Court That Prejudice Was Not an Element to the Suretyship Issue, and Fourthly, the Court Should Not Require This Appellee to Bear the Costs and Fees Involved in This Appeal When the Trial Court Rightly Relied Upon Appellant's Statement of No Detriment and Ruled in Reliance Upon It.

As the factual statement of the case shows, the issues before this Court involved the pre-existing debt of the partner White while he was an active partner; they do *not* involve his liability for debts incurred *after* his retirement. The facts show no express agreement supported

by consideration; they show *no additional benefit* of any kind accruing to the existing creditor, William E. Brown, after the retirement of appellant White; they show *no substitution* of debtors or of persons not previously liable who assumed Mr. White's liability in a new firm; they show that by the signing of the promissory notes payable to appellee Brown by the remaining partners, Noakes and Neubauer, such partners did not agree to any more than they were obligated to do while they were partners with Mr. White. In short, the facts show nothing which suggests consideration—a benefit to the creditor or a detriment to the debtor for which he is not already obligated and made for the benefit of the retiring partner.

The Majority Opinion, without legislative enactment, has made novel departures from settled principles of law by erecting exceptions to general principles and exceptions within the exceptions. This case involves valuable rights and important contractual relations in the law relating to joint and several obligations. The Majority Opinion permits the *unilateral* action of a debtor to abrogate a pre-existing contractual debt for which he was liable, although the creditor receives no additional benefit, and although he does not expressly consent to such action.

The Majority Opinion adopts a rule which relieves a retiring partner of a pre-existing debt in the absence of an express agreement. No useful purpose can be served by repetition of the reasons why this principle is unsound (Appellee's main brief, pp. 3 to 9). They are largely and effectively stated in the Dissenting Opinion of Judge Washington in this case. However, the Majority altogether fails to consider the fact the rule it adopts was based upon an old English case, *Oakley v. Pascheller*, 4 Clark & F. 207, 7 Eng. Reprint 80, 19 Bligh N.S. 548, 6 Eng. Reprint 202. It was not until the latter English case of *Swire v. Redman*, 1 Q.B.D. 536, that it was pointed out that *Oakley* had been misinterpreted; unfortunately, by this time the error

had crept into the law of a number of American States. See *Dean v. Collins*, 15 N.D. 535, 108 N.W. 242, 9 L.R.A. (N.S.) 49. The Majority should reconsider this factor and the remaining issues suggested by appellee because it has adopted a new rule of law of considerable significance to the commercial community.

Finally, after adopting these principles of suretyship, the Majority Opinion states that the concession of no prejudice was "not made with respect to (the) defense (of) discharge as surety."

It is respectfully submitted that an examination of the record does not bear out the Court's statement (Joint Appendix, page 39). The appellant never took the position before the Trial Court that he suffered detriment, never proffered any evidence of detriment or prejudice, never contested the position of appellee that there was a stipulation of concession to this effect, never requested this Court, even at the argument of the instant case, to be relieved of the stipulation made to the Trial Court below. As the dissenting Opinion states (Opinion, p. 13) the fact is that appellant made no claim of detriment to the Trial Court, but persistently urged there, as well as here, that no such detriment was required.

It is respectfully submitted that it is not necessary for this Court to extricate appellant from the position he took in the Court below. It is not only not necessary; it is submitted that it is unfair, because it was appellant's own statement to the Trial Court which led the Court to direct a verdict (Joint Appendix, p. 39). At the very least, the Court should modify its Opinion to compel Appellant to bear the costs of this appeal since the Majority Opinion of the Court has permitted Appellant to retract a position stated to the Court below and to modify his theory set forth in this Court after the Trial Court directed a verdict, and the appeal proceeded on the stipulation made and the theory advanced by the Appellant himself.

III. In the Event That the Division of This Court Which Heard the Argument Fails to Grant This Petition for a Rehearing or for a Modification of the Court's Opinion, a Rehearing En Banc Should Be Granted Because of the Novel Questions of Local Importance Involved.

As the foregoing indicates and as may be found in both Appellee's main brief and the Opinion, the primary issues involved in this case concern themselves with the relationship between a creditor and a debtor and with the question whether a retiring partner may, without the express consent of a creditor, be discharged for a debt incurred while he was an active partner of the partnership.

The Opinion of the Majority adopts two novel doctrines for the District of Columbia: The first doctrine is one of so-called "waiver". It states that the retiring partner may be discharged and have his liability eliminated insofar as all past due debts are concerned, if there is a "waiver" by the creditor unsupported by consideration. As previously pointed out in this brief (pages 1-9), the cases upon which the Majority relies to support this doctrine are cases of *novation* involving substituted debtors—new partners and new consideration—and as such, cannot support the "waiver" or release theory. There simply is no such doctrine in the law. The second ruling of the Majority Opinion is that, without express approval, a retiring partner becomes a surety for past due partnership debts existing at the time he was an active partner, if this partner obtains an indemnity agreement from the remaining partners and the creditor merely has notice of it. This doctrine converts a debtor on an existing contract into a surety, by his own unilateral action, without any agreement of any kind to this effect from the creditor, and without any consideration or additional benefit to the creditor.

These two doctrines which are adopted by the Majority are not only matters of first impression here, but are important to innumerable commercial relations in the District of Columbia.

The law of contracts rests upon stability and settled principles, perhaps to a greater degree than any other segment of the law. A change such as found at Bar judicially alters a large number of existing local contracts with creditors. The dissenting Opinion of Judge Washington aptly terms the Majority's views as being in *derogation of general principles relating to the enforceability of obligations and the creation of an anomaly in the law* (Opinion, pages 10, 12 and 13). The authorities cited by the Court Majority do not support its "waiver" theory. There are no sound reasons of business policy, as the dissent points out, which justify adopting the still further rule which converts the retiring partner into a surety without an express agreement supported by consideration.

The question here is whether or not this Court should allow the Petition for Rehearing en Banc, in the event that the Division of the Court which heard the case fails to grant the Petition for a Rehearing addressed to the Division. In the case of *Cafeteria & Restaurant Workers v. McElroy*, No. 14689, decided April 14, 1960, the Judges of this Court considered the reasons under which a Petition for a Rehearing En Banc was justified.

In the course of his dissent in that case, Judge Fahy pointed out that, where a decision involves issues of the local importance, and is a case in which the decision is deemed by the Majority to be erroneous, and where the decision must be corrected by the Court *En Banc* (if at all) because it is not worthy of presentation to the Supreme Court, then these are sound grounds for granting the Petition for a Rehearing En Banc (page 38).

All of the grounds set forth in Judge Fahy's dissent in *Cafeteria and Restaurant Workers v. McElroy*, *supra*, are applicable here.

The issues involved are ones of local importance. There are hundreds of local partnerships and thousands of credi-

tors constantly immersed in the commercial activities of the District of Columbia. The issues decided by the Majority are novel to the District of Columbia. The case is of such local importance and significance that it would not be considered by the Supreme Court. The decision alters all existing District of Columbia contracts and debts between like parties.

Such being the case, and for the reasons stated in this Petition, and based upon the authorities cited herein, in the appellee's main brief, and in the Dissenting Opinion of Judge Washington, this Court should grant a Rehearing En Banc in the event that the Division of the Court which heard this case fails to grant the Petition for a Rehearing addressed to that Division.

Respectfully submitted,

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Certificate

This is to certify that the foregoing Petition is filed in good faith and not for the purposes of delay.

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